92-1798

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER, ALLEN E. BARSETH, *ET AL.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND UNITED AIRLINES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In duty of fair representation cases:

1. Is a labor union's bad faith bargaining away of existing employment rights of employees it dislikes, in order deliberately to harm them, reviewable only on the deferential standard applied to good faith but allegedly arbitrary union acts under *Air Line Pilots Association v. O'Neill*, 499 U.S. ____, 111 S. Ct. 1127 (1991)?

2. Are the following grounds proper ones, consistent with this Court's decisions in the area, to uphold a union's deliberate harming of such disfavored employees—

(a) a union's economic interest in discouraging the future hiring of permanent strike replacements is a "rational" reason to discriminate against any in the bargaining unit, even years after the strike has been settled?

(b) a rational explanation could be conceived for the conduct, although the union has been found not to have acted on that basis?

3. If a union acted for mixed motives, one of which was improper, is it automatically absolved of any violation of the duty if any of its other motives was proper?

PARTIES TO THE PROCEEDING

Petitioners Lee Rakestraw, John L. Barker, Allan E. Barseth, *et al.*, were Plaintiffs in the District Court, and Appellees, Cross-Appellants (against the Air Line Pilots Association), and Appellants (against United Airlines), in the Court of Appeals for the Seventh Circuit.[1]

[1] The following persons, all plaintiffs below, are petitioners in this Court: Lee Rakestraw, John L. Barker, Allan E. Barseth, Michael Bloodhart, Michael P. Bove, Alfred Breen, Hal R. Breeze, James E. Brice, Carter Brusch, Urs Buehler, Mark I. Burnette, Duane E. Chance, Robert M. Chisholm, Eugene J. Ciarmatori, Thomas S. Clark, Peter H. Coebergh, Vaughn Beasly Cordle, Mohammad Daoud, Glen Dietz, Stephen J. Dreiling, Clifford Ehorn, Kenneth R. Eisemann, John A. Eisenhart, Michael Sultan Etezadi, Leonard D. Graves, Gary Green, Douglas C. Hawkins, G. Lynn Henish, Glen C. Hermecz, J. Robert Hogan, Curtis E. Holley, Kenneth L. Hopfer, Stephen L. Howard, Peter A. Jarldane, Michael E. Jones, Al Khosh, James P. Killoran, William A. Kirkland, Norman H. Kitchens, Robert J. Klein, Dean E. Krull, James D. Laing, Rodney H. Lambertz, Robert K. Lane, Ralph A. Lennen, Ted Lewis, David A. Lippard, Edwin C. Loomis, Richard J. Lussow, James Many, James D. Marquis, Richard V. Massegee, Charles C. Monch, Frank Mostofi, John R. Pasley, Ralph D. Pate, Michael J. Peet, Richard W. Pletan, Allan R. Poulin, Earl J. Pounds, Paul H. Rafalowski, Larry B. Reese, Thomas A. Repas, Norman O. Rosen, Norman G. Rosendale, Philip G. Roth, Wallace B. Ruch, John A. Sasso, James A. Savage, Jerry Scarboro, Bill Schoen, Charles H. Schneider, John M. Snow, Robert B. Somerville, Robert D. Spencer, George R. Spillman, Ronald B. Stark, John F. Steiner, Eugene E. Stocker, John F. Sullivan, Ralph E. Tallent, Robert G. Thomas, Eugene S. Thomason, Steven H. Van Jepmond, Mary K. Vaughn, Ralph P. Venezia, Jr., Robert A. Wenberg, Alivia L. Wheeler, Raymond C. Winn, Charles F. Young and Raymond H. Young.

In addition to the petitioners, the following persons were also plaintiffs in the District Court and Appellees, Cross-Appellants, and Appellants in the Court of Appeals for the Seventh Circuit:

(Footnote continued on following page)

Respondent Air Line Pilots Association, International, was a Defendant in the District Court, and Appellant and Cross-Appellee in the Court of Appeals.

Respondent United Airlines, Inc., was a Defendant in the District Court and an Appellee in the Court of Appeals.

---

[1] *continued*

John Bodanske, Ken Cook, John Crawford, Joe Dye, Vanita Gallo, Peter Gropp, Darrell Jelle, Jim Logg, James Mott, Greg Newman, James Nicholes, John Novak, Jerry Smith, Bill Stout, Ray Stropes, Larry Sutton, Francis Vancini and James Wilhite.

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Lee Rakestraw, John L. Barker, Allan E. Barseth, *et al.*, petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit and its Judgment (App. 1-26) were entered on December 28, 1992. The Opinion is reported at 981 F.2d 1524. The Opinion of the two Judges dissenting from the denial of rehearing *en banc* (App. 27-33) is not yet reported. The Opinion of the United States District Court for the Northern District of Illinois of May 30, 1991, is reported at 765 F. Supp. 474.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on December 28, 1992. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was filed on January 11, 1993, and denied by Order of April 6, 1993. (App. 27-33.)

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners are pilots hired by United Airlines ("United") as permanent replacements during a May 1985 strike. This case arose from a campaign of the Air Line Pilots Association ("ALPA") to reverse their seniority positions. ALPA sought to place ahead of them on United's seniority list another group of pilots (known as "the 570") who, while United trainees, had honored the picket line in 1985 though United had informed them that they would not become United employees if they did not report.

In a prior decision, *ALPA v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) ("*ALPA*"), the Seventh Circuit held that the 570 had not become United employees under the Railway Labor Act by May 1985 and therefore United had no obligation to hire them. 802 F.2d at 892, 913-14 and n.19. On April 3, 1987, after certiorari was denied, ALPA and United entered into an amendment (the "1987 agreement") to the collective bargaining agreement ("CBA") to resolve post-

strike issues. United agreed to extend new offers of employment to the 570 (who had worked at United pursuant to the district court's injunctive order, which the Seventh Circuit reversed), but with seniority behind the petitioners. ALPA agreed that that seniority adjustment "fully, finally and forever" resolved all disputes with United concerning the seniority of the 570 (App. 55) and that ALPA would "never" again renegotiate the relative seniority of the 570; "nor will it seek to . . . raise the issue of the 'group of 570' relative seniority position as part of any future negotiations between [United and ALPA] regarding any subject whatsoever." (App. 54.) ALPA also agreed to take no reprisals against petitioners. (App. 55.)

From the 1987 Agreement until after the decision below was rendered, petitioners remained ahead of the 570 on United's seniority list. However, beginning "within days" of signing the 1987 Agreement, ALPA tried to undo it. (App. 58.) Finally, in return for major economic concessions by ALPA costly to all members of the bargaining unit, United in 1991 agreed to amend the CBA to reverse the seniority and put the 570 ahead of petitioners. (App. 61-62.)

Petitioners brought suit in the district court to enjoin the implementation of that provision of the 1991 CBA, basing jurisdiction on 28 U.S.C. §1331, and pendent jurisdiction over certain state law claims. They alleged, *inter alia*, that ALPA had violated its duty of fair representation[2] toward them as members of the bargaining unit (a violation in which they alleged United had participated); and that their rights as third party beneficiaries of the

[2] The duty, in the context of this case, is implied under the Railway Labor Act, 45 U.S.C. § 151, and is necessitated by the due process clause of the Fifth Amendment. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-99 (1984).

1987 Agreement, as well as certain contractual commitments made by United in offering them employment, had been breached.

The district court enjoined the implementation of the new seniority provision, holding that ALPA had violated its duty of fair representation toward petitioners. It rejected petitioners' other claims, and dismissed United as a party. (App. 76-84.)

The Seventh Circuit fully accepted the findings which the district court considered to justify the injunction. (App. 19.) The Seventh Circuit noted (App. 8-9) that the gist of the district court's findings was that ALPA's actions concerning seniority were part of a "six-year vendetta" against the replacements; that "ALPA's leaders promised guerilla warfare against the . . . replacement pilots," who "were harassed in and out of cockpits—with the active and thoroughly illegal support of ALPA's leadership . . .;" and that ALPA had obviously disregarded its agreement not to reopen the seniority issue and to eschew reprisals against petitioners. ALPA's actions, and its many overt demonstrations of hostility toward petitioners, were detailed by the district court. (App. 58-71.) The Seventh Circuit noted that "ALPA's leadership, like many of United's pilots, detested the strike-breakers and wanted revenge, by means fair or foul." (App. 19.)

The district court found that "the evidence clearly demonstrates that ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly" (App. 70 and n.11), thus rejecting ALPA's main argument that some valid reason other than hostility to replacements explained its actions concerning seniority. It ruled that "ALPA has acted in bad faith in negotiating to reverse the relative seniority rights of [petitioners] in the 1991 collective bargaining agreement." (App. 75-6.)

The Seventh Circuit reversed. It held ALPA's actions justified as part of the compromise that unions must make among elements in the bargaining unit; that "[b]argaining has winners and losers" and petitioners were simply losers in that process. (App. 12.) It also held that ALPA could have bargained to favor the 570 over petitioners in settling the strike (App. 20), and it made no difference that the action at issue was a reversal of seniority years later, and abrogated ALPA's own agreement that the subject was closed forever. (App. 21-22.)

The Seventh Circuit disparaged reliance in *ALPA v. O'Neil*, 499 U.S. ____, 111 S. Ct. 1127 (1991), on "[b]uzzwords such as 'bad faith' and 'arbitrary' [as] being empty . . . ." (App. 15.) It held that mixed with ALPA's desire "to harm the replacements" were two rational justifications: first, ALPA "wanted to restore the normal seniority arrangements [at] United . . . .;" and second, ALPA had institutional reasons "to reduce the advantages enjoyed by the replacements, and thus to strengthen the hand of organized labor in future conflicts with management." (App. 22.)[3]

A petition for rehearing and suggestion for rehearing *en banc* were denied, with two judges dissenting. (App. 27-33.) The dissenting judges rejected the standard used by the panel to determine that ALPA did not violate its duty of fair representation. The dissent observed that the panel opinion "boils down the [*O'Neill*] inquiry into a single factor: If the union acted so as to benefit the workers

[3] The Seventh Circuit decided this case together with *Hammond v. Air Line Pilots Assn.*, No. 91-2957 (7th Cir. 1992). Although the same incorrect legal standards were applied to *Hammond* as to this case, *Hammond* arose from a different controversy, is factually dissimilar, and was decided by a different district judge, who denied the plaintiffs their relief.

as a whole, then it did not breach its [duty of fair representation]." (App. 31.) The dissenters considered the panel's analysis to deviate from established law of the Supreme Court and to place the Seventh Circuit in conflict with several other circuits. (App. 28.)

REASONS FOR GRANTING THE WRIT

The decision below presents important issues as to the scope of a union's duty of fair representation, especially its duty to replacements, who, after a strike has been settled, remain part of the bargaining unit. That decision departs from rulings of this Court and conflicts with rulings of other circuits.

1. In holding consistent with the duty of fair representation a "six year vendetta", in which ALPA acted in bad faith to strip plaintiffs of seniority rights to which ALPA itself had agreed, the Seventh Circuit disregarded this Court's decisions in *ALPA v. O'Neill*, 499 U.S. ____, 111 S. Ct. 1127 (1991), and *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Those decisions establish a "tripartite standard" for duty of fair representation cases, which demands that unions refrain from arbitrary, discriminatory or bad faith actions. The Seventh Circuit held that terms such as bad faith are "empty" ones, and that ALPA's concededly animus-driven behavior should be judged solely by the relatively deferential test used in applying the arbitrariness part of the standard. ALPA was then absolved of any violation on the ground that it also had "rational" reasons for its actions.

As the Seventh Circuit judges dissenting from the denial of rehearing *en banc* noted (App. 28), the ruling below not

only "deviates from established law of the Supreme Court," but "places this circuit in conflict with other circuits . . ." As the dissenters stated (App. 29), other circuits after *O'Neill* have held the three categories to be distinct and cumulative, and have restricted the deferential review to claims of arbitrariness. *E.g., Carter v. United Food and Commercial Workers, Local 789*, 963 F.2d 1078, 1082 (8th Cir. 1992).

Review should be granted to resolve this conflict and to determine whether the other circuits and the dissenters below are not correct in considering that "[a]ll of *O'Neill's* references to deference and 'a wide range of reasonableness' relate only to whether the union acted arbitrarily, not whether it acted discriminatorily or in bad faith." (App. 30.)

2. The Seventh Circuit also held that a union's economic interest in discouraging hiring of replacements was a sufficient and valid reason to discriminate against them in seniority matters. That holding is at odds with the requirement that unions represent fairly "all" bargaining unit employees, *O'Neill*, 111 S. Ct. at 1134. It was taken to the extreme that reversing relative seniority relationships within a unit, to the detriment of a shunned minority, was held to be rational years after the relationships had been settled, though there have been no intervening events. The Seventh Circuit thought that such seniority could have been set against the petitioners initially or in a strike settlement, and jumped to the conclusion that ALPA therefore was unrestrained thereafter in any efforts to reverse the seniority that had been granted. This frustrates the legitimate expectations of such employees and invites instability in labor relations. It again departs from prior law on the subject.

The Seventh Circuit cited, as the only other reason it thought justified ALPA's behavior, one that the district court found was not an actual reason ALPA acted; that is, that ALPA allegedly wanted to conform the seniority practices to historical ones. In other contexts parties may not rely on pretextual reasons for their conduct, and logic suggests that they should not be able to do so in fair representation cases.

These holdings merit further review, for they stretch the concept of rationality so far beyond deference that they undermine the fundamental tenets of the duty and sound labor policy.

3. The court below also held that in mixed motive duty of fair representation cases, the union automatically wins if any of its motives was valid. That position, too, is rejected in all parallel contexts, *e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-54 (1989), and this Court should determine whether it is permissible in fair representation cases.[4]

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[4] United was joined as a defendant, and is a respondent to this petition, because plaintiffs allege that United participated in ALPA's breach of the duty of fair representation, and also urge that United should be joined to "insure complete and meaningful relief." *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 329 (1969).

The Seventh Circuit's holding that United is not liable (App. 22-23) follows and appears to be derivative of the absolution of ALPA from liability, but in *dictum* that court also implied that an employer pursuing its separate economic interest could never be responsible for a union's violation of the duty, at least if it held no malice toward the affected employees. That point was settled to the contrary of the *dictum* by *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569-70 (1976); see also *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 759 (3d Cir. 1977).

In petitioners' view, should certiorari be granted and the judgment below be reversed, the issue of United's liability should be remanded for further consideration.

I.

IN DUTY OF FAIR REPRESENTATION CASES, "BAD FAITH" AND "ARBITRARINESS" TESTS ARE SEPARATE AND ARE CONSIDERED UNDER DIFFERENT STANDARDS OF REVIEW.

In *ALPA v. O'Neill*, 111 S. Ct. 1127, 1134-35 (1991), this Court unanimously reaffirmed its holding in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), that the duty of fair representation requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." It made clear that this is a "tripartite standard," each part of which the union must meet.

The court below disparaged the phrase "bad faith" as "empty" and an "epithet" lacking intrinsic meaning. (App. 11-15.) Effectively, it reduced all three parts of the *Vaca-O'Neill* standard to a single test for allegedly arbitrary but concededly good faith conduct: whether there was any rational ground for the union's action. That is not the law, and the panel's implication that *O'Neill* supports such a position (App. 13) cannot be squared with the text of *O'Neill*. In *O'Neill* itself this Court "express[ed] no opinion on whether respondents have put forth a triable issue concerning whether ALPA acted in bad faith," *id* at 1133, n.6, and remanded that question.[5]

As the Seventh Circuit judges dissenting from the denial of rehearing *en banc* noted (App. 28-29), the decision below conflicts with rulings of other Circuits. The Eighth

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[5] On remand, the Fifth Circuit proceeded to decide that issue, holding that there was no bad faith in the particular case, 939 F.2d 1199 (5th Cir. 1991). Under the Seventh Circuit's ruling in this case, however, that entire procedure would have been futile and unnecessary.

Circuit has rejected explicitly the very merging of the three parts adopted here, and has held that "[t]he 'wide range of reasonableness' standard [of *O'Neill*] applies only to allegedly *arbitrary* union conduct," *Carter v. United Food and Commercial Workers, Local No. 789*, 963 F.2d 1078, 1082 (8th Cir. 1992) (emphasis original); and other Circuits have done so implicitly, *Colon Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, 940 (1st Cir. 1992) (standard stated in disjunctive); *Perry v. Million Air*, 943 F.2d 616, 619 (6th Cir. 1991) (same); *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 940-42 (9th Cir. 1992).[6]

Nor does logic suggest that an intentional harming of disfavored minority employees in the unit should not be reviewed on the same relatively lenient standard as the mere carelessness alleged in *O'Neill*. A higher level of judicial oversight for bad faith is warranted because it implicates a union's fiduciary duty of loyalty. 111 S. Ct. at 1134. This Court has long phrased the requirement that unions act "in complete good faith and honesty" as a condition to the sustaining of their discretionary acts. *Id.*; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1945). The dissent also observed that the panel opinion severs the duty of fair representation from its roots in securing representation for all workers, even unpopular ones. As the two dissenters from denial of rehearing en banc noted, "[all] of this deference ignores that the concept of the duty of fair representation was created to protect minority interests, and by necessity, places a limit on majority rule." (App. 32.)

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[6] In *Jones* the Ninth Circuit also held it significant to the degree of scrutiny applied that the union was the initiator of the disputed action, rather than merely being accused of insufficient resistance to employer initiated actions. 968 F.2d at 940.

The setting of the appropriate standard of review is important to workers, unions, employers and the bar, *see Dober v. Roadway Express, Inc.*, 707 F.2d 292, 295 (7th Cir. 1983), and the conflict should be resolved. As *Dober* reflects (see the concurring opinion, *id.* at 296), before *O'Neill* the Seventh Circuit had taken a uniquely narrow view of the duty, ruling out any liability for unintentional union conduct. Moreover, the dissenting opinion below similarly notes: ". . . this circuit has already been criticized by the Supreme Court for its crabbed interpretation of the duty of fair representation . . . (citing *O'Neill*, 111 S. Ct. at 1134)." (App. 33, n.2). The present decision comes full circle, returning to a uniquely narrow position, this time one rendering wilfulness irrelevant.

Before the present decision, it was long thought that the clearest possible violation of the duty was "hostile discrimination," see, *e.g.*, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944); *Humphrey v. Moore*, 375 U.S. 335, 349 (1964) (actions must be "without hostility"); *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 200 (4th Cir. 1963) (discrimination based on lack of active union membership is hostile and forbidden). Petitioners urge this Court to consider whether the Seventh Circuit has not unsettled what *O'Neill* and decades of cases before it had settled.[7]

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[7] There is no warrant for the Seventh Circuit's reasoning that (App. 11) "bad faith" should not be a talisman because that term is hard to define. Its earlier decision in *Bennett v. Glass Workers Local 66*, 958 F.2d 1429, 1438 (7th Cir. 1992), as observed by the dissent on denial of the rehearing petition, had noted that the appropriate response to the fact that "[i]ntent is a slippery matter", is recognition that "deference to the trier is particularly important when it comes to findings involving scienter."

II.

THE COURT BELOW HELD "RATIONAL" REASONS FOR UNION CONDUCT WHICH ARE THE ESSENCE OF ILLEGALITY, OR WERE NOT THE REASONS WHICH MOTIVATED ALPA, AND FAILED TO FOLLOW PRECEDENT WHICH HOLDS REVERSALS OF SETTLED SENIORITY TO BE ARBITRARY.

A. Punishing Minority Employees to Further a Union's Institutional Objectives is an Improper Motive, Not One Rendering its Actions "Rational," Especially if it Occurs Years After the Fact.

The court below held that it is a rational reason, dispelling arbitrariness, for a union deliberately to punish replacements to enhance its future bargaining strength, for the supposed benefit of the unit as a whole. (App. 21-22.) This makes a virtue of the very kind of activity heretofore thought to be the essence of a duty of fair representation violation. In effect, the court has said that as unions always have an institutional reason to oppose replacements, there is at most a very attenuated duty to represent them fairly.[8] That holding is unprecedented; literally the seminal cases demand that unions represent "all" members fairly, *e.g.*, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944); *Vaca v. Sipes*, 386 U.S. at 177; *O'Neill*, 111 S. Ct. at 1134.

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[8] The Seventh Circuit added (App. 16) that the union had a duty to refrain from shooting replacements or, possibly, reducing non-strikers pay in the collective bargaining agreement. The suggestion that there exist such limitations on denying benefits to replacements only exposes a severe flaw in this decision. For, if such discrimination were "rational" due to the union's economic interest in opposing their employment, the court's primary reasoning, taken to its logical extreme, might justify harming replacements indefinitely in all aspects of pay, seniority and all other employment benefits.

If there be some perverse "rationality" in a union's deliberately harming one segment of a bargaining unit in order to increase its own future economic power, it is one that other Circuits have held to work against defendant unions. These circuits have considered the fact that a disfavored minority of employees has been singled out for unfavorable treatment for such political reasons as rendering the action at least suspect, if not dispositive that a violation has occurred, rather than as an affirmative justification for the union's actions. *E.g.*, *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 614 (1st Cir. 1987); *Goclowski v. Penn Central Trans. Co.*, 571 F.2d 747, 758-61 (3d Cir. 1977); *Jones v. TWA*, 495 F.2d 790 (2d Cir. 1974). The ruling below conflicts with those decisions. A union may gain future economic power in relation to an employer by many different kinds of actions which discourage or throttle minorities in the bargaining unit. If that be a reason sustaining its actions, the very core purpose of the duty to protect minorities (see the dissent at App. 32) is severely compromised.

The Seventh Circuit compounded its abnegation of any meaningful duty of fair representation to petitioners by holding that the state of affairs it sanctioned may exist indefinitely. That court saw no difference between a choice of seniority status among groups made by a union initially or upon an intervening event such as a merger of carriers, and one which reverses established seniority to the advantage of a favored majority absent any intervening event.[9] But that is a distinction widely recognized in the

[9] Petitioners certainly do not "all but concede" (App. 20) that ALPA and United could have agreed in their back-to-work agreement to subordinate petitioners' seniority to that of the 570. Rather, petitioners argued to the contrary, citing such cases as *Teamsters*

(Footnote continued on following page)

law, for good reasons. For example, in *Barton Brands Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976), the court expressly made the distinction here rejected. It noted that the line of cases relied on here:

> "all involved endtailing decisions made at the time of the initial acquisition rather than after the employees had been dovetailed into the acquiring firm's unit. In these cases the affected employees, unlike the employees in the case at bar, did not lose benefits they believed they were entitled to, nor were they prejudiced by relinquishing other employment opportunities in reliance on the dovetailing arrangement."

Accord, Air Wisconsin Pilots v. Sanderson, 909 F.2d 213, 216 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 958 (1991); *DeBoles v. TWA, Inc.*, 552 F.2d 1005, 1016 (3d Cir.) (distinguishing case from "union attempt to reduce or cancel seniority benefits already conferred upon a minority in a pre-existing agreement"), *cert. denied*, 434 U.S. 837 (1977); *Hargrove v. Brotherhood of Loc. Engineers*, 116 F. Supp. 3 (D.D.C. 1953) (arbitrary reversal of seniority positions held for three years invalid).

O'Neill itself appears to endorse the distinction, noting that "[a] rational compromise *on the initial allocation of the positions* was not invidious 'discrimination' of the kind prohibited by the duty of fair representation," and that the particular adjustment was warranted because it "did not permanently alter the seniority system," 111 S. Ct. at 1137 (emphasis added).

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[9] *continued*
Local Union No. 42 v. NLRB, Goclowski v. Penn Central Transp. Co., and *Jones v. TWA*, all discussed in the text above. See the Consolidated Response and Opening Brief filed by petitioners in the Seventh Circuit, at 36. Petitioners urged that a reversal of seniority rights years after the fact, with no intervening events, added a further dimension to ALPA's conduct, which by itself was dispositive that it violated the duty.

The logic of this distinction is not only that the justifiable reliance of employees like petitioners on the practice previously agreed to by the union should not be thwarted where no new event has made that necessary, but that otherwise, "disputes over seniority would fester—as they have done in this case . . . ." *Air Wisconsin*, 909 F.2d at 216. The decision below undercuts both objectives and should not stand. It also too readily excused ALPA's repeated undermining of its own agreement permanently to end this seniority dispute, and to avoid reprisals, and rewarded ALPA's active disruption of stability by allowing it to invoke alleged continuing dissatisfaction within the bargaining unit as to seniority as a reason to undo its own agreements.

In *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 792 (1990), this Court, in holding that a union does not automatically lose its status as bargaining representative if after a strike a majority of the unit should be composed of replacements, relied in part on the fact that interests may converge "after the strike, once job rights have been resolved . . . ." The corollary to this holding must be that at least after a strike has ended, the union's general obligations to replacements under the duty of fair representation apply fully. Thus this issue is logically related, and of similar importance, to that decided in *Curtin-Matheson*.

This decision puts in doubt whether replacements ever effectively can enforce the duty of fair representation, and in doing so impinges on this Court's holdings that they can lawfully be hired[10] by allowing them to be treated as second-class citizens within the bargaining unit.

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[10] *E.g., TWA v. Int'l Federation of Flight Attendants*, 489 U.S. 426 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

It presents issues important not only to a union's relationship to replacements, but more generally to what union conduct is "rational" under *O'Neill*, which should be reviewed by this Court.

B. A Reason for Which a Union Did Not Act Cannot Render Its Actions "Rational." Nor is It Rational to Favor Non-Employees over Employees in Seniority.

The other reason the Seventh Circuit cited as making ALPA's action rational, to put seniority of the 570 and petitioners on the same plain as historical treatment of prior trainees, was explicitly found by the district court not to be the actual reason that ALPA acted (App. 70-71), a finding the court of appeals did not challenge. As the district court made clear, the historical treatment excuse was pretextual; among other things, the 1991 CBA did not treat petitioners like prior trainees. (App. 70.)[11] Also, as the 570 were not even employees at the relevant time, it is arbitrary to favor them in seniority over petitioners, who did have that status.

In analogous contexts under the civil rights laws, a party "may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of decision." *Price Waterhouse v. Hopkins*, 490 U.S. at 252. In not

[11] The Seventh Circuit in its prior *ALPA* decision held that the 570 were not United employees in May 1985, and had no employment rights, because they were not on its payroll, and had been informed that they would never become employees unless they reported at the outset of the strike. 802 F.2d at 910-13. Thus they inescapably were not similarly situated to other former trainees of United, who had been on the payroll and employed from the outset of their training.

holding ALPA even to that rule, the Seventh Circuit compounded its confusion of the three distinct portions of the *O'Neill* test. It considered that a "legislative" review standard sanctioned reliance on any possibly rational ground, even if its invocation was pretextual. There are two basic flaws in that analysis: first, as shown above, that standard is not appropriate to allegations that a union has deliberately sought to harm a disfavored group. Second, however, *O'Neill* never suggested that pretextual reasons can carry the day under any standard, or that a long course of meretricious behavior such as ALPA's gains credence if its ultimate fruition is in an amendment to a collective bargaining agreement.

Even in reviewing purely legislative classifications, the courts do not accept ones ostensibly neutral, but which are pretexts for discrimination or which reflect a purposeful discriminatory intent. *E.g.*, *Hunter v. Underwood*, 471 U.S. 222, 228, 231-32 (1985); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (where there is "proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified"). And, even where some analogy to legislative acts is appropriate in fair representation cases, it should not be carried to the excess of rendering a union's motive irrelevant or unreviewable, for the reasons which may limit inspection of legislative bodies' motives—difficulty in ascertainment due to the large number of legislators, and reluctance of a court to question the *bona fides* of a co-equal branch of government—have no relevance to review of union actions.

III.

THE EXISTENCE OF A "MIXED MOTIVE" FOR A UNION'S ACTIONS COULD NOT NEGATE ITS VIOLATION OF THE DUTY OF FAIR REPRESENTATION.

The Seventh Circuit considered this a "mixed motive" case, and stated that "a bad motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole." (App. 20.) As shown above, ALPA had no legitimate reasons for its actions; the ones relied on by the Seventh Circuit were either demonstrative of a failure to represent "all" employees fairly and therefore improper as a matter of law, or not ones on which ALPA had acted. Thus, this should not have been viewed as a genuine mixed motive case, in which a party acted for illegal and legal motives both, *Price Waterhouse*, 490 U.S. at 258.

But if it were so considered, and a standard at least equivalent to that applied in Title VII cases were adopted for fair representation cases, the union would be liable unless it proved that it would have taken the same action absent the illegal motive. *Id.*, 490 U.S. at 252-54; *also cf. Hunter v. Underwood*, 471 U.S. at 231-32 (rejecting view that the existence of a permissible motive "trumps any proof of a parallel impermissible motive"). ALPA was not held to any such standard by the Seventh Circuit; it proved nothing of the sort, and surely would not have engaged in the six-year course of conduct involved here absent anti-replacement animus.

Petitioners submit that a *stronger* standard should apply in duty of fair representation cases. The tripartite test holds that a bad motive *does* spoil actions aimed at harming particular disfavored employees. The duty is a fiduciary one, *O'Neill*, 111 S. Ct. at 1134, flowing from the fact that unions have exclusive bargaining power to ex-

ercise on behalf of unconsenting individuals, including ones with whom it shares a mutual dislike. This circumstance suggests that the law must demand professionalism in union bargaining activities, and therefore suppression of grudges against unpopular employees in the bargaining unit.

While application of the *Price Waterhouse* standard would have led to an affirmance of the injunction here, adoption of an even higher standard would be more consistent with the policies noted above and the requirements that unions act in complete good faith and without hostility. In various contexts of labor law, standards ranging from those used under the civil rights law, upward to higher standards, have been applied in mixed motive cases but in none of the contexts has one as lax as that announced by the Seventh Circuit here been approved. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (NLRB reasonably could adopt standard of Title VII); *Bradford v. Textile Workers Local 1093*, 563 F.2d 1138, 1143 (4th Cir. 1977) (under LMRDA plaintiff need prove only that protected speech was "a" cause of adverse action, not the "primary" cause); *Petromale v. Local 17 of Laborers International Union*, 736 F.2d 13, 18 (2d Cir.), *cert. denied*, 469 U.S. 1087 (1984) (if valid reasons are inextricably intertwined with intent to suppress speech, conduct violates LMRDA even if union would have imposed discipline in absence of that speech); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1470 (6th Cir. 1992) (applying Title VII standard to LMRDA case, while noting that some Circuits apply stronger standard); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974) (under Railway Labor Act, "[a]nti-union motivation invalidates even a discharge which could be justified on independent grounds").

The standard applicable to fair representation cases is an important and recurrent issue, which should be settled by this Court. The holding below that the union is to be absolved automatically if it acted with mixed motive in bargaining should be reviewed and rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER, ALLEN E. BARSETH, *ET AL.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND UNITED AIRLINES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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[981 F.2d 1524 (7th Cir. 1992)]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 91-2285, 91-2416, 91-2417, 91-2502, 91-2503, and 91-2535

LEE RAKESTRAW, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 2325—**Suzanne B. Conlon**, *Judge.*

No. 91-2957

DAVID A. HAMMOND, *et al.*,

Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION and
TRANS WORLD AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 2792—**George W. Lindberg**, *Judge*.

ARGUED FEBRUARY 24, 1992—DECIDED DECEMBER 28, 1992

Before BAUER, *Chief Judge*, and CUMMINGS and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Two cases present a common question: does a union's duty of fair representation under the Railway Labor Act block the union from adjusting seniority in a way known to favor some employees over others? Both of these cases arise out of trauma at an airline: in one case its acquisition by a larger carrier, and in the other a strike followed by the hiring of replacement pilots.

In each case the union (the Air Line Pilots Association, or ALPA) negotiated with management an agreement providing every pilot with seniority from the date of hire. In the first case, the pilots of the smaller carrier contend that they should have received bonus seniority or equivalent protection (such as denying TWA's pilots seniority credit for time on furlough) to offset the fact that dovetailing the seniority lists worked to the advantage of the larger carrier's pilots, who on average had longer service. In the second case, the pilots hired during the strike contend that another group of pilots should have received seniority from the day they went to work in the cockpit rather than the day they reported for training, in order to protect the positions that they assumed in the face of animosity from the striking pilots.

Judge Lindberg found in the first case that by melding the seniority lists without a bonus for the pilots from the smaller airline the union did not violate its duty of fair representation. Judge Conlon found in the second case that by creating a uniform rule of seniority for all pilots

the union violated its duty to the replacements, who acquired vested rights in an earlier agreement. To obtain the seniority rule, the union had given $200 million in concessions to the carrier. The judge's ruling let the airline keep these concessions while restoring an earlier seniority table—one management strongly favored, as it rewarded pilots who had been loyal to it during the strike.

I

We simplify the facts. Details are irrelevant on the view we take of the union's obligations. Interested persons may glean additional particulars from the district court's opinions, our own prior opinion in the second case, and an opinion of the Supreme Court of Colorado addressing some state-law issues that are not salient here. *Hammond v. Air Line Pilots Ass'n*, 141 L.R.R.M. 2063, 1991 U.S. Dist. LEXIS 13558 (N.D. Ill.); *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474 (N.D. Ill. 1991). See also *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *DeJean v. United Airlines, Inc.*, 1992 Colo. LEXIS 981.

A

In 1985 Trans World Airlines was in financial distress. Texas Air Corporation made overtures to acquire TWA. Terrified by the reputation that Texas Air's honcho Frank Lorenzo had acquired for slicing wages, TWA's unions made overtures of their own to other potential acquirers. Eventually the unions cut a deal with Carl Icahn, head of an investment group that acquired TWA. The pilots made sizable concessions, in exchange for which Icahn agreed not to reduce the size of the airline. This agreement, called the "wraparound agreement" because it wraps around the gap between old and new corporate shells, provides among other things that there shall be "no full or partial merger undertaken of the pilot seniority lists of the airline operated by TWA or New TWA . . . and any such other [acquired airline] . . . without prior consent of ALPA".

In 1986 TWA acquired the stock of Ozark Airlines. The pilots at TWA, having made concessions the prior year, wanted job security. They preferred having Ozark's pilots added at the end of TWA's seniority list, as if they had been hired on the date of the merger, but were willing to dovetail the seniority lists, giving each pilot seniority from the date hired by either airline. TWA was an old, shrinking carrier; the pilots still working there had long seniority, while Ozark, a growing regional carrier, had a younger labor force. A merger by date of hire would leave TWA's pilots with the pick of the assignments. The pilots at Ozark understood this. Seeing that melding the seniority list by date of hire would leave them near the bottom, the first to go if TWA continued shrinking, they demanded protection. One common bulwark is slots: for example, if TWA had three times as many pilots as Ozark, then the three most-senior pilots at TWA would be numbers 1 to 3 on the seniority list, the most senior pilot at Ozark would be number 4, positions 5-7 would go to TWA's pilots, position 8 to Ozark, and so on. That method would boost Ozark's senior pilots, hired during a period when TWA was laying off pilots, from puddle jumpers to 747s, and demote some of TWA's captains. Deadlock ensued. TWA's pilots would not yield more than merger by date of hire, and Ozark's pilots stood on their demand for protection.

ALPA has a merger policy providing for arbitration if the two carriers' pilots cannot agree how to merge seniority lists. On behalf of all pilots, ALPA then asks the employer to implement the arbitral award. Ozark's pilots demanded arbitration. Hank Duffy, the president of ALPA, deferred convening the arbitral panel, seeking to mediate the dispute. Meanwhile ALPA did not consent to merger of the seniority lists. TWA then announced that it would operate Ozark's planes with TWA's pilots. TWA wanted Ozark's assets—planes, gates, and landing slots—rather than its labor force. The wraparound agreement barred shrinkage at TWA but not a transfer of planes into TWA. Staring unemployment in the face, Ozark's pilots accepted

a merger of the seniority lists by date of hire, approving the agreement by a vote of 329 to 35. Eventually Ozark's pilots got a slight bonus: ALPA convened an arbitral panel, which established seniority "cells" protecting Ozark's pilots from losing some of the positions they had in the cockpits of Ozark's former aircraft. TWA's pilots received some protective cells in exchange, and these too aggrieve Ozark's pilots. ALPA sought more shelter for Ozark's pilots by lobbying (Congress let the merger proceed) and asking federal regulators for terms that would protect Ozark's pilots as conditions of the acquisition (it lost, *Air Line Pilots Ass'n, Int'l v. Department of Transportation*, 338 F.2d 563, 567 (D.C. Cir. 1988)).

In this litigation a class of Ozark's former pilots accuses ALPA of violating its duty of fair representation under the Railway Labor Act as well as committing offenses under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a). The pilots contend, too, that both ALPA and TWA dishonored their obligations under the wraparound agreement, which would violate the Railway Labor Act. 45 U.S.C. §152 Seventh. Most of plaintiffs' claims emphasize ALPA's departure from its usual "merger policy" and Duffy's supposed toadying to the more numerous TWA pilots, who threatened to secede from ALPA unless they got their way.

After holding the case under advisement for 19 months, the district judge granted summary judgment to ALPA and TWA, adopting the defendants' briefs as his statement of reasons. Judges must give their own reasons and may not adopt parties' briefs. *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990). We remanded the case so that the judge could comply with Circuit Rule 50. The court promptly issued a new opinion explaining that dovetailing is a non-arbitrary objective for a union, that there is no evidence that ALPA's leaders had it in for the Ozark pilots, and that the Ozark pilots' vote undercut most of their remaining contentions. The court also concluded that the wraparound agreement creates rights in favor of TWA's

pilots exclusively, even though it names ALPA as a whole; Ozark's pilots are not third-party beneficiaries.

Adversity has continued at TWA, which is now a debtor in bankruptcy. Seniority turned out to matter greatly. Many of Ozark's former pilots did not last long at TWA. The bankruptcy judge has lifted the automatic stay, permitting this appeal to proceed.

B

United Airlines had hired no pilots since 1979 when, in 1984, it decided to expand its operations. It recruited would-be pilots for training during 1984-85. In a departure from practice, United did not hire them at the start of training but said that the hiring would be effective only when they reported for flight duty. United was negotiating a two-tier wage structure with its existing pilots and sought to hire the new group at the lower rate. Although the trainees were not on the payroll (United was paying their expenses only), they received tentative seniority numbers based on the date their training began.

Negotiations with ALPA did not go well. In April 1985 the National Mediation Board announced an impasse, remitting both sides to their own devices on May 17, 1985. The union called a strike for that date. United directed the trainees (570 of whom completed the program) to report for work on May 17 and proclaimed that anyone who did not do so would never work for United. Only 25 of the 570 reported on May 17; another 6 began to work in the ensuing days.

United also hired replacements for the striking pilots. The new "fleet qualified" pilots—that is, persons already certified by the FAA as able to fly the types of planes in United's fleet—were assured permanent employment at a premium wage. Although new pilots were to receive starting salaries of $22,500 per year under United's two-tier schedule, the carrier offered $75,000 to captains and $50,000 to first officers among the replacements. Relative

seniority, United explained, would depend on when they started and what others did: the replacements would rank behind any of the Group of 570 who worked during the strike, and behind any pilots returning at the end of the strike. Before the strike began, United also told four of the replacements that few of the 570 were expected to report and that it did not plan to hire the others. This implied greater relative seniority for the replacements. Minimum salaries of $75,000 or $50,000 would continue, United promised, even if the replacements' low seniority pushed them back to the third seat in the cockpit. Lower seniority would knock the replacements out of the more desirable planes, positions in the cockpit, routes, and bases, even though they retained their salaries.

United hired 219 fleet qualified pilots, who have seniority dates between May 17 and June 28. During the strike United accepted another group of trainees. Three hundred twenty of these student pilots ultimately went to work, receiving seniority dates in July 1985 as they reported for flight. The 219 fleet qualified pilots and the 320 student pilots have become known as the Group of 539.

The strike ended on June 15, 1985, without a new collective bargaining agreement. The striking pilots returned to work with their original seniority. Members of the Group of 570 who reported during the strike and the 219 fleet qualified replacements retained their positions; the 320 student pilots began work in due course. ALPA and United agreed to disagree about the fate of those in the Group of 570 who had not worked during the strike. United insisted that it would never employ them, and ALPA that this was illegal discrimination on account of concerted activity (that is, honoring the picket lines).

On behalf of the Group of 570, ALPA initiated litigation. Judge Bua directed United to hire any members of this group (called the Group of 500 in that litigation) who still wanted work, with seniority from May 17 (ahead of most of the Group of 539). *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 614 F. Supp. 1020, 616 F. Supp.

849 (N.D. Ill. 1985). United put these trainees on a preferential hire list, and many of them began to work. Our decision the next year, 802 F.2d 886, concluded that the Group of 570 was not protected by the Railway Labor Act after all. That statute applies only to "employees," and members of the Group of 570 did not become employees until they reported for assignments as pilots. 802 F.2d at 910-17. Other parts of the opinion held that the guaranteed salaries for the fleet qualified pilots did not violate the Act, *id.* at 907-10, but that some of United's position bidding practices were illegally discriminatory, *id.* at 898-901.

United threatened to fire those of the Group of 570 who had been hired by virtue of the injunction. Under the Railway Labor Act, the pilots could not threaten a strike in response. With no leverage at the bargaining table, ALPA took the best offer United was willing to make: it would retain strikers from the Group of 570 with a seniority date of November 9, 1985. (November 9 was the date of the preferential hire list required by the district judge's injunction.) ALPA promised that "it will never seek to challenge [United's] action . . . in court or before an arbitrator, nor will it seek to raise the issue of the 'Group of 570' relative seniority position as part of any future negotiations . . . regarding any subject whatsoever." Every working member of the Group of 570 signed a document releasing both United and ALPA from all liability. (The Supreme Court of Colorado has held that the releases are valid.)

United was happy, because pilots who had sided with management during the strike became senior to the members of the Group of 570 who honored the picket lines. Other pilots were dismayed that the replacements were to receive not only premium salaries but also plum bases, routes, and positions in the cockpit. ALPA's leaders promised guerrilla warfare against the fleet qualified replacement pilots, and, if need be to get the 219 replacements, against the entire Group of 539, even though the 320 student pilots had not crossed the picket lines. The 219 were harassed in and out of the cockpits—with the active and

thoroughly illegal support of ALPA's leadership, the district judge found.

Rancor among the pilots and the lack of a collective bargaining agreement drove ALPA and United back to the table. Management came around to the view that efficient operation of the airline required peace with ALPA, and that the price of peace was to reverse the seniority positions of the Groups of 570 and 539. Knowing that the union dearly wanted this reversal, United held out for concessions. In April 1991 labor and management signed a new collective bargaining agreement. In exchange for concessions worth $200 million, ALPA obtained the seniority dates it preferred. All working members of the Group of 570 obtained seniority dates of May 17, 1985, with priority among themselves according to the first date of training. Because United hired no pilots between 1979 and May 17, 1985, this effectively gave the Group of 570 seniority as of the first date of training, which had been United's traditional practice.

Although the fleet qualified replacements kept their salaries, many lost routes, bases, aircraft, and positions in the cockpit they preferred. Instead of giving orders to members of the Group of 570, they were taking orders from them. One hundred three of the fleet qualified replacements filed this suit, contending that ALPA violated its duty of fair representation, that both union and management violated the promise made in the settlement of 1987, and that United broke the promises made to them in 1985.

The district court consolidated a request for a preliminary injunction with the trial of the merits. Judge Conlon ruled in defendants' favor on all claims but one: the duty of fair representation. After finding that "ALPA has nurtured a six-year vendetta against the 539 and the fleet qualified pilots in particular", 765 F. Supp. at 491, the court held that ALPA "unfairly abrogated the legitimately-negotiated seniority status that plaintiffs have relied upon for four years." *Id.* at 493. The court continued:

> Overwhelming evidence demonstrates that ALPA bitterly opposed the very existence of fleet qualified pilots. Plaintiffs have therefore proven by a preponderance of the evidence that in negotiating the 1991 collective bargaining agreement, ALPA unfairly discriminated against the 539, and the fleet qualified pilots in particular.
>
> It is of no consequence that there is a rational basis for granting the 570 . . . seniority as of May 17, 1985. . . . [T]he seniority of the 570 . . . could be logically determined in a number of ways. However, ALPA and United had previously negotiated the 1987 letter agreement as a permanent solution to the dispute over the 570's seniority. . . . ALPA has acted in bad faith in negotiating to reverse the relative seniority rights of the 539 in the 1991 collective bargaining agreement.

Ibid. (paragraph numbers and footnote omitted). In other words, once union and management settle a dispute about seniority, the union's duty of fair representation prevents reopening the issue—for the only outcome is to prefer one group of employees over another in a zero-sum game.

II

Negotiation means compromise. Neither employees as a whole nor particular groups of employees emerge from bargaining with all their wants satisfied. Often unions can achieve more for some of their constituents only by accepting less for others. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.*

v. Huffman, 345 U.S. 330, 338 (1953). See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964). It is the "subject always" reservation—coupled with the proposition that "[t]he bargaining representative . . . owes complete loyalty to the interests of *all* whom it represents", 345 U.S. at 338 (emphasis added), "without hostility to any", *id.* at 337—that sets the stage for the disputes in our two cases. What *is* "good faith and honesty of purpose" when a union sacrifices the achievement of some employees' wishes in order to obtain more for other employees?

Some years after *Huffman*, the Court concluded that a union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith". *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Until *ALPA v. O'Neill*, 111 S. Ct. 1127 (1991), inferior courts debated whether this standard applies to the negotiation of a collective bargaining agreement as well as to the administration of that agreement; *O'Neill* holds that it does. There remains the problem of identifying "arbitrary, discriminatory, or . . . bad faith" conduct. These terms are not self-defining. They are conclusions—epithets rather than standards of conduct or tools of analysis. When are these labels appropriate? We know from *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-800 (7th Cir. 1976), that a union may not take away the seniority of some employees for no reason other than that the losers have too few votes to affect the outcome of an intra-union election, or that they opposed the union's leadership, and from *Bennett v. Glass Workers Local 66*, 958 F.2d 1429, 1436-39 (7th Cir. 1992), that a union may not sell an employee down the river for no reason at all, or for a reason forbidden on substantive grounds, such as race or internal union politics. See also, e.g., *Camacho v. Ritz Carlton Water Tower*, 786 F.2d 242 (7th Cir. 1986). Thus a union may not disfavor those among its members who voted against its officers in the last election, or employees in the bargaining unit who refuse to join the union (unless there is a valid union security clause). Employees have a statutory right to choose to be represented by unions, or freely to oppose unions. Just as the

employer may not penalize collective action by the workers, so the organized workers may not penalize those who prefer individual to collective decision-making.

A conclusion that a union may not neglect or penalize dissidents pushes the problem to a different plane of generality. What is a forbidden penalty? Ozark's pilots insist that they were "penalized" during the merger of seniority lists because they were not numerous enough to influence ALPA's leaders; the union replies that all pilots were treated equally. The fleet qualified pilots at United insist that they were penalized for replacing striking workers; the union replies that all pilots now have seniority from the beginning of their time (whether training or flight) with the airline, and that at all events the union is entitled to offset the preferences, such as the extra salary, the employer has provided to a favored group of employees. The same acts may be characterized as "bad faith" efforts to take a perquisite away from one group, or as normal efforts to provide a level playing field for all workers. Slogans can be mustered on all sides.

So we are back to the beginning. Bargaining has winners and losers. See *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 917 (7th Cir. 1989); *Merk v. Jewel Companies, Inc.*, 848 F.2d 761, 764-65 (7th Cir. 1988); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1287-90 (7th Cir. 1980). A better retirement plan and other deferred compensation helps older workers at the expense of younger ones, who prefer cash to cover current expenses. Accepting lower fringe benefits (less health insurance, fewer days off) in exchange for higher cash wages helps the majority at the expense of the sick and those whose religious faith requires them to take extra days off. Higher wages assist those who remain with the firm at the expense of workers who may be laid off when the employer loses business to its competitors. Reducing the difference between the wages of skilled and unskilled workers assists the less skilled, who also tend to be more numerous. Unless its leaders are unfathomably dense, the

union knows who wins and who loses. The losers always may say that the union "intended" them to lose. As all of society is an assembly of minorities, the losers can point to some respect (age, sex, religion, politics, skill, health, membership in the union, status during the most recent strike) in which they are in a minority, and insist that the distinction must have been part of a "bad faith" plot to "penalize" them on account of that status. Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act (like the National Labor Relations Act), and a requirement of the Labor-Management Reporting and Disclosure Act, is that unions act democratically to reach a collective decision—the majority is entitled to prevail. *Humphrey*, 375 U.S. at 349-50; *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).

Huffman and *O'Neill* show that a conflict among workers does not undercut the union's ability to choose. The union representing Ford's employees negotiated a collective bargaining agreement that counted military service as time with the firm for purposes of seniority, whether or not the worker had been employed by Ford before his military service. This meant that people arriving fresh from the military would leap over some persons who had been at Ford for years. The Court thought this collective bargaining agreement reasonable, even though it contained a further provision giving special protection to union officials. *Huffman*, 345 U.S. at 339, 342. In *O'Neill* the union settled a strike by agreeing to a seniority table that favored replacement employees but secured some slots for the returning strikers. The Court concluded that this agreement was not arbitrary, because it reduced the risk that the returning strikers would get nothing. 111 S. Ct. at 1136.

After *O'Neill*, is the union safe when throwing in the towel but not when fighting for the strikers? Plaintiffs in *O'Neill* were striking pilots who believed that the union had given too much away in the back-to-work agreement.

Unions rarely face charges of being too cozy with management, and the pilots' union has a reputation for being particularly tough. (These cases involve the same union as *O'Neill*, which operates without traditional locals.) *O'Neill* tells us that surrender is OK if the union gets the table scraps and, most likely, even if it does not. When battling fiercely for labor, a union is more likely to encounter a charge of "bad faith"—that it set out to injure those who, by working during a strike, assisted management. If the union as "bargaining representative . . . owes complete loyalty to the interests of all whom it represents", *Huffman*, 345 U.S. at 338, "without hostility to any", *id.* at 337, does it not follow that the union owes "complete loyalty" to the strike breakers? It represents *everyone* in the bargaining unit, after all. Yet the weapons of economic warfare usually are matched. Unions may go on strike, managers initiate lockouts. Unions picket, managers hire replacements. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). If managers may tempt replacements with premium wages and super-seniority, see *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926, 930-31 (7th Cir. 1982), may the union not try to take these favors away?

Unions commonly demand that "permanent" replacements give way to the returning strikers, and that inducements dangled before these workers be snatched back if they remain employed. Cf. *Aqua-Chem, Inc. v. NLRB*, 910 F.2d 1487 (7th Cir. 1990), rehearing denied, 922 F.2d 403 (1991). Does this violate the union's duty to represent its *enemies* fairly? Must the union, perhaps, advance the interests of the replacements, at the expense of the strikers, once they achieve a majority in the bargaining unit? Premium wages and the like do not violate the labor laws—which provide that employers cannot discriminate against those who engage in concerted action—if we consider the high wages rewards for work, rather than treating normal wages as penalties for rallying 'round the union's standard. Then it follows that efforts by the union to turn

the tables also are not "penalties" for taking sides in the strike, or otherwise evidence of forbidden motive. In *O'Neill* the Court assumed that a union may try to reward the faithful (or at least restore parity) after the strike. Plaintiffs' theory in *O'Neill* was that ALPA had not done "enough" to protect the strikers at the expense of the replacements. Instead of replying that a union is not entitled to do *anything* to advance workers who respect picket lines over those who cross them, the Court explained that the union's decision about how much protection of the strikers is "enough" should be respected unless arbitrary or in bad faith. That must entail the conclusion that the effort to aid one group at the expense of another is not *itself* arbitrary or in bad faith.

Buzzwords such as "bad faith" and "arbitrary" being empty, *O'Neill* analogized the union's choice to that of a legislature, subject to the most deferential judicial review. No one would pretend that cases interpreting the equal protection clause of the fourteenth amendment, which the Court summoned up, 111 S. Ct. at 1135-36, are an integrated whole. But they do give illustrations of both method and result. A legislature may prefer dairy farmers over consumers, *Nebbia v. New York*, 291 U.S. 502 (1934), optometrists over opticians, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and long-time homeowners over newcomers, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), provided only that a rational person might believe that these distinctions serve the interest of the polity as a whole. Cf. *McCann v. Chicago*, 968 F.2d 635 (7th Cir. 1992). Slapping the label "bad faith" or "discrimination" on a classification that is rationally related to a legitimate objective does not alter the analysis. A discriminatory motive without a discriminatory rule does not condemn a statute. *Palmer v. Thompson*, 403 U.S. 217 (1971); cf. *McGowan v. Maryland*, 366 U.S. 420 (1961) (rule rationally related to legitimate objective not spoiled by religious motivation of some sponsors). Knowledge that some groups gain or lose as a result of a rule does not even amount to a discriminatory motive. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

Unions legitimately may try to advance the interests of labor at the expense of investors and consumers. Success in this endeavor requires concerted action. That is to say, unions have been authorized to use the tools of cartels, and success depends on concerted action, including dealing with "cheaters." Whatever undercuts concert among labor reduces the effective wage unions can secure. Managers try to undermine labor's position by divide-and-conquer tactics: by individual negotiations, by favors for their friends. To say that the union acts in "bad faith" or "discriminatorily" when it attempts to shore up the solidarity of labor by eliminating the distinctions managers try to introduce is to curb an important tool by invoking a slogan. There are limits on what labor can do in response to management. Unions may not shoot strike-breakers, and we may assume that they may not negotiate for wage scales the mirror image of managers' preferred systems (that is, a collective bargaining agreement may not provide that workers who respected the picket line, or joined the union, receive a premium over others). Beyond these limits, workers generally may decide by majority vote where their interests lie.

III

A rational person could conclude that dovetailing seniority lists in a merger, treating service at either firm as of equal weight, without quotas or other preferences for either group of employees, serves the interests of labor as a whole. Seniority lists sometimes are endtailed. That is, the employees of the smaller firm are given seniority only from the date of the acquisition, effectively added at the end of the larger firm's seniority roster. Contentions that endtailing violates the union's duty have been unsuccessful. *Frandsen v. Railway Clerks*, 782 F.2d 674 (7th Cir. 1986); *Schick v. NLRB*, 409 F.2d 395 (7th Cir. 1969). The propriety of dovetailing, treating the two groups identically, follows directly. If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm.

Equal treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority. Cf. *Employment Division v. Smith*, 494 U.S. 872 (1990). These principles dispose of the Ozark-TWA case.

The former Ozark pilots emphasize that ALPA did not follow the "merger policy" it developed to ensure both equal treatment and solidarity. For the sake of assessing their argument, we assume that the belated reference to arbitration means that ALPA did not "follow" its "merger policy." Adhering to this policy insulates the union against a charge that advocating the arbitrators' award in negotiations with the employer violates the duty of fair representation. *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 216-17 (7th Cir. 1990). It does not follow that deviation exposes the union to liability. Policies do not spring to life fully grown, as from the brow of Zeus. Like the common law, ALPA's "merger policy" is the result of evolution, of experimentation and change when circumstances warrant. It did not become frozen in 1986, all modification taboo.

Union officials hoped to bridge the gap between Ozark's and TWA's pilots without litigation—and arbitration is a form of litigation. Cramming the "merger policy" down the throats of an unwilling cadre at TWA could have been calamitous for Ozark's pilots, because TWA held all the cards. It was free under the wraparound agreement to acquire Ozark's planes and put TWA's pilots to work in their cockpits. TWA's pilots would have been delighted. The union's agreement was needed only for a formal merger of seniority lists; TWA demonstrated both ability and willingness to conduct the transaction as an asset acquisition, leaving the shell of Ozark as a subsidiary. TWA did not need Ozark's pilots and was hardly likely to offend its own pilots by arranging the transaction in a way that favored Ozark's. ALPA's "merger policy" could not compel TWA to agree to anything, and it did not seem likely, under the circumstances, to produce agreement within the

union either. So ALPA experimented, emphasizing negotiations between representatives of the two groups rather than what Duffy feared would be premature intra-union litigation. Perhaps Duffy was wrong, but a mistake in judgment does not violate the duty of fair representation.

All of the Ozark pilots' remaining contentions, variously expressed in terms of the Railway Labor Act, the LMRDA, and the wraparound agreement, founder on their own vote in favor of the merger and the ensuing new collective bargaining agreement. ALPA did not give the consent required by the wraparound agreement until Ozark's pilots voted in favor of the merger with dovetailed seniority lists. (Because Duffy's consent on behalf of ALPA satisfied the conditions of the wraparound agreement, it is unnecessary to decide whether the union as a whole, or only TWA's pilots, possesses entitlements under it.) According to Ozark's pilots, we should disregard their approval because it was given under duress: TWA had transferred four planes to itself, furloughed 86 Ozark pilots, and was threatening to move the rest of the fleet in the same way. Straightened circumstances these were, but a decision to make the best of a poor position does not vitiate a choice. *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987). TWA, not the union, was applying the screws. TWA had every right to use economic pressure. To treat the pilots' response as voidable, making their vote a one-way street in which they could reap any benefit but would surrender nothing, would ensure that employers paid no heed to unions' promises in the future. A group disabled from making binding concessions cannot expect anything in return. One of the principal objectives of labor law is peaceful, which is to say contractual, resolution of differences. When one side may abandon its promises by pleading hard circumstances, the institution of contract and all its benefits are imperiled.

The Ozark pilots' reformulation of their contention as a challenge to their "exclusion" from the TWA pilots' voting on the new collective bargaining agreement is puzzling. At the time TWA's pilots voted, Ozark's pilots were

insisting that they had a binding agreement with Ozark and did not want to vote on another. You can't complain that you were "excluded" from an election you boycotted! Had every Ozark pilot voted "no," the TWA pilots' affirmative votes would have carried the day. Setting aside a foredoomed outcome because of irregularities in the voting cannot be justified. Cf. *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761-66 (1991). A wrong is actionable only when it causes injury; here the TWA pilots' support for the agreement, rather than any legal wrong done to the Ozark pilots, is a sufficient cause of the final collective bargaining agreement. But, as we have said, no wrong was done. Ozark's pilots eventually stopped sulking, voted, and approved the pact. A voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep their contracts, even when they wish they could have made better deals.

IV

ALPA's leadership, like many of United's pilots, detested the strike-breakers and wanted revenge, by means fair or foul. This loathing played a role in the union's efforts to increase the seniority of the Group of 570, which would demote the fleet qualified pilots. Giving the Group of 570 seniority from May 17, 1985, *also* demoted the 320 trainees, none of whom crossed the picket lines and many of whom have joined the union, but the district judge's findings of fact—none of which is clearly erroneous—establish that the union was willing to pay this price to get back at the reviled 219 replacement pilots.

The district court believed that a retaliatory motive rendered it "of no consequence that there is a rational basis for granting the 570 . . . seniority as of May 17, 1985." 765 F. Supp. at 493. Even on the assumption that a bad motive spoils an agreement rationally serving the interests of labor as a whole, the district court's conclusion does

not necessarily follow. ALPA had mixed motives. It wanted to harm the replacements, but it also wanted to restore the normal seniority arrangements at United—the arrangements that had been in place for many years before United started training the Group of 570, that were part of the union's proposals before the strike, and that United honored in part when assigning the trainees tentative seniority numbers based on the dates they began training. Would the union have held out for giving the Group of 570 seniority as of May 17 had there been no replacement pilots, leaving the 320 trainees the only losers? If yes, then it is hard to chalk up the seniority arrangement to a bad motive. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Cf. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87 (1977). The district judge did not discuss the dual-motive problem.

For the reasons developed in Part II of this opinion, however, a "bad" motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union. The 219 fleet qualified pilots fared no worse than the 320 trainees, and both the 570 and the 539 received seniority slots that would had been forthcoming under United's pre-strike practices. Plaintiffs all but concede that United and ALPA could have agreed in their back-to-work agreement that all members of the Group of 570 employed by United would receive seniority as of May 17 (with priority among themselves according to their first date of training), and that union and management could have reached the same settlement in 1987, after we reversed Judge Bua's injunction. See *TWA v. Flight Attendants*, 489 U.S. at 435-37; *Belknap, Inc. v. Hale*, 463 U.S. 491, 513-14 (1983) (Blackmun, J., concurring). Hostility is common in strikes, especially when some people cross the picket lines. Solutions often involve adjusting the positions of those who did and did not work during the strike. To say that antipathy toward the strikebreakers forbids the union from advocating the cause of

its adherents would make the settlement of strikes much harder. The Norris-LaGuardia Act put the federal courts out of the business of protecting employers and strikebreakers against unions. Nonetheless, plaintiffs submit, everything changed when ALPA capitulated in 1987. Thereafter they had vested rights, which the union could no more change than it could invade their bank accounts to finance its operations.

Once a seniority system is in place, many employees come to think of their position in the pecking order as a form of property. Higher seniority means more desirable assignments and greater security of employment. Preventing jolts to these expectations is an objective the legal system shares with the parties. E.g., *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 (1989). Yet seniority does not "belong" to an employee, any more than he "owns" the prospect of receiving a given wage next year or flying the St. Louis-Paris route rather than the leg from Minneapolis to Duluth. Seniority is a creation of collective bargaining agreements and equivalent contracts between unions and employers. When these expire, employers are free to use other criteria, such as merit, to assign jobs and decide who will be let go in hard times. Like wages and fringe benefits, seniority is a legitimate subject of discussion and compromise in collective bargaining. *Schick v. NLRB*, 409 F.2d 395, 398 (7th Cir. 1969); *Food Workers Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990).

Barton Brands holds that a union may not juggle the seniority roster for no reason other than to advance one group of employees over another. The change must rationally promote the aggregate welfare of employees in the bargaining unit. 529 F.2d at 800. ALPA had at least two rational and appropriate objectives from this perspective: (1) to reduce the advantages enjoyed by the replacements, and thus to strengthen the hand of organized labor in future conflicts with management, and (2) to restore the seniority system that United had long used. The first shores

up the monopolistic quality of organized labor. The second recognizes that stability is itself a legitimate objective, for the reasons given in *Nordlinger* and *McCann*. Management also had legitimate reasons to agree to the request: labor gave concessions worth $200 million, and the alteration of the seniority tables reduced (although it could not eliminate) the friction among pilots that was hampering operations.

ALPA's promise in 1987 that "it will never seek to challenge [United's] action . . . in court or before an arbitrator, nor will it seek to raise the issue of the 'Group of 570' relative seniority position as part of any future negotiations . . . regarding any subject whatsoever" may create contractual rights, but it does not change the elements of the union's duty of fair representation. And it does not create contractual rights enforceable in court by the Group of 539. Parties to an agreement—only ALPA and United signed this one—may change their minds and negotiate anew. If the 1987 agreement creates rights that the Group of 539 may enforce as third-party beneficiaries, the parties' disagreement is a "minor dispute" that must be submitted to an arbitral panel under the Railway Labor Act. 45 U.S.C. §184. We need not decide whether this is appropriate, because the Group of 539 has spurned the procedures under the Railway Labor Act. As for the future: ongoing accommodation is a hallmark of labor relations. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 308-09 (1989); *Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960); *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 273-74 (1958). "Forever" in labor relations means "until the next collective bargaining agreement." Excepting vested rights, a promise lasts only until renegotiation or the expiration of the agreement. *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215, 2226 (1991).

Pledges of the sort ALPA made in 1987 do have one important effect: they remove the topic as a mandatory

subject of collective bargaining. *Battle v. Clark Equipment Co.*, 579 F.2d 1338, 1347 (7th Cir. 1978). United could wave off any effort by the union to negotiate concerning the Group of 570's seniority position. Parties may not negotiate to impasse over a topic that is a permissive rather than a mandatory subject of collective bargaining, and in consequence failure to reach agreement may not be the basis of a strike or lockout. In order to make headway on a permissive subject of bargaining, a party must offer something valuable in return. That is what happened; ALPA paid through the nose for a change in the seniority table. United obtained favorable terms that enabled it to expand its operations—incidentally creating more positions for pilots.

Remaining contentions require only a few comments, because we generally agree with the district court's disposition of them. 765 F. Supp. at 494-97. The fleet qualified pilots contend that United violated its contracts with them when putting them behind the Group of 570. But the written contracts are conspicuously silent about seniority. United promised permanent employment at a premium salary and has lived up to these commitments. Oral statements about probable seniority rankings were predictions, not promises; the contracts state that the only promises are those written down. United told some replacements that members of the Group of 570 who did not work during the strike would never work at all. Until a district judge issued an injunction, United adhered to this position—which again was not part of the written contract.

Recasting the argument as a contention that ALPA wrongfully interfered with the contracts between United and the replacement pilots adds nothing. United kept its contracts. Anyway, a principal purpose of unions is to interfere with—indeed to eliminate—direct bargaining between firms and their workers. It is equally futile to charge United with "conspiring" with ALPA to violate its duty of fair representation. There was no violation. Employers are free to prefer one group of employees over another;

the fleet qualified pilots, as recipients of a hefty preference, are in no position to protest that offsetting benefits have been ceded to another group. And it preposterous to depict *United* as hostile to the fleet qualified pilots. It wanted to save money and reduce strife among its pilots, recognizing that doing so weakened management's hand in any future conflict.

The judgment of the district court in the Ozark-TWA dispute is affirmed. The judgment of the district court in the United case is reversed to the extent it enjoins implementation of the seniority provisions of the 1991 collective bargaining agreement. The remainder of the judgment is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: December 28, 1992

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

Nos. 91-2285, 91-2416, 91-2417, 91-2502,
91-2503 and 91-2535

LEE RAKESTRAW, JOHN L. BARKER, ALLAN S. BARSETH, et al.,

Plaintiffs-Appellees, Cross-Appellants

v.

UNITED AIRLINES, INCORPORATED,

Defendant-Appellee

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant-Appellant, Cross-Appellee

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 2325, Judge Suzanne Conlon

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is REVERSED to the extent it enjoins implementation of the seniority provisions of the 1991 bargaining agreement and the remainder of the judgment is AFFIRMED, in accordance with the decision of this court entered this date. Each party to bear their own costs.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2285, 91-2416, 91-2417, 91-2502,
91-2503, and 91-2535

LEE RAKESTRAW, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant-Appellant, Cross-Appellee.

No. 91-2957

DAVID A. HAMMOND, *et al.*,

Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION and
TRANS WORLD AIRLINES, INC.,

Defendants-Appellees.

ON PETITIONS FOR REHEARING

DECIDED APRIL 6, 1993

Before BAUER, *Chief Judge*, and CUMMINGS and EASTERBROOK, *Circuit Judges*.

Petitions for rehearing were filed by the plaintiffs in each of these two consolidated cases. All of the judges on the panel voted to deny rehearing, and the petitions are accordingly denied.

A judge in active service called for a vote on the suggestions of rehearing in banc, which failed to obtain a majority. Judges Flaum and Ripple voted for rehearing in banc.

RIPPLE, *Circuit Judge*, with whom FLAUM, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc.

The district court held that Air Line Pilots Association ("ALPA") had breached its duty of fair representation ("DFR") in the *Hammond* case, and that it had not breached its DFR in the *Rakestraw* case. On appeal, the panel held that ALPA had not breached its DFR in either case. The plaintiffs in both cases have petitioned for rehearing with suggestion for rehearing en banc. At issue is the standard the panel employed in determining that ALPA had not breached its DFR. Because the panel's analysis deviates from established law of the Supreme Court and this court, and because it places this circuit in conflict with other circuits, the petition for rehearing en banc should be granted.

The panel opinion deviates from the standard that the Supreme Court has established for DFR cases. The standard was originally set out in *Vaca v. Sipes*, 386 U.S. 171 (1967). There, the Court found that a breach of DFR "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190. The Court recently affirmed that *Vaca*'s standard is indeed the proper test for DFR cases: "Although there is admittedly some varia-

tion in the way in which our opinions have described the unions' duty of fair representation, we have repeatedly identified three components of the duty . . ." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127, 1134 (1991). In addition to affirming *Vaca*'s three-part standard, the Court clarified that "a union breaches its duty of fair representation if its actions are *either* arbitrary, discriminatory, or in bad faith." *O'Neill*, 111 S. Ct. at 1130 (emphasis added). The Court thus characterized the test as a "tripartite standard." *Id.* at 1135.

The courts of the various circuits have employed this tripartite test and have recognized that a union's conduct must be evaluated separately under each of its three components. For example, in *Colon Velez v. Puerto Rico Marine Management, Inc.*, the First Circuit noted that a union breaches its DFR "if its actions are *either* arbitrary, discriminatory, or in bad faith." 957 F.2d 933, 940 (1st Cir. 1992) (emphasis added). *Accord Carter v. Local No. 789*, 963 F.2d 1078, 1080 (8th Cir. 1992); *Perry v. Million Air*, 943 F.2d 616, 619 (6th Cir. 1991). In *Carter*, the court was clear that the three components must be evaluated separately. There, the court stated that the district court erred when it evaluated the union's conduct under a single "reasonableness" test that "blurred the distinction between the 'arbitrary' and 'discriminatory' prongs of the test." *Carter*, 963 F.2d at 1082.

Prior to *Rakestraw* and *Hammond*, we dutifully employed the tripartite test. In *Ooley v. Schwitzer Division, Household Manufacturing, Inc.*, 961 F.2d 1293 (7th Cir.), *cert. denied*, 113 S. Ct. 208 (1992), the court cited *O'Neill* and noted that "the standard is a tripartite standard where the courts should look to each component separately rather than merging the test into a single requirement of honesty and good faith." *Ooley*, 961 F.2d at 1302. The court then went on to evaluate the union's behavior in light of each of the three components. In *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1436 (7th Cir. 1992), we also recognized that the test was a "tripartite standard."

Despite the court's previous—and recent—adherence to the well-established tripartite standard, the panel in *Rakestraw* and *Hammond* did not apply it. The panel started down the right path by stating that in *Vaca* the "Court concluded that a union breaches its duty of fair representation if its actions are arbitrary, discriminatory, or in bad faith." *Rakestraw v. United Airlines, Inc.*, Nos. 91-2285, 91-2416, 91-2417, 91-2502, 91-2503, 91-2535, slip op. at 11 (7th Cir. Dec. 28, 1992). However, the panel quickly left that path and dismissed the standards of the tripartite test as "conclusions—epithets rather than standards of conduct or tools of analysis." *Id.* At no point in the opinion did the panel break down its analysis into an examination of the three discrete parts of the established test. The panel even suggested that *O'Neill* itself did not follow the tripartite test: "Buzzwords such as 'bad faith' and 'arbitrary' being empty, *O'Neill* analogized the union's choice to that of a legislature, subject to the most deferential judicial review." *Rakestraw*, slip op. at 15. The panel used this deferential standard throughout its analysis. What the panel failed to recognize is that *O'Neill*'s analogy related only to the arbitrary prong of the tripartite test. *O'Neill* instructs that "a union's actions are *arbitrary* only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 111 S. Ct. at 1130 (emphasis added).

All of *O'Neill*'s references to deference and "a wide range of reasonableness" relate only to whether the union acted arbitrarily, not whether it acted discriminatorily or in bad faith. Each prong is a separate inquiry. The panel erred in applying this deferential standard across the board. The same error was made by the district court in *Carter*. Reversing the district court, the Eighth Circuit stated, "the district court held that the union's conduct, as a whole, passed the [*O'Neill*] 'wide range of reasonableness' test. In so holding, however, the district court blurred the distinction between the 'arbitrary' and 'discriminatory' prongs of the [*O'Neill*] test. The wide range of reasonableness

standard applies only to allegedly *arbitrary* union conduct." *Carter*, 963 F.2d at 1082 (emphasis in original).

In *Ooley*, this court recognized that *O'Neill*'s deference only applies to the "arbitrary" prong. The court stated that "a union only violates the arbitrary prong of the analysis when the union's actions are so far outside a wide range of reasonableness . . ." *Ooley*, 961 F.2d at 1302. After finding that the union had not acted arbitrarily under this "extremely deferential standard," the court went on to say that "[i]t seems to be a different question, however, whether or not" the union acted discriminatorily or in bad faith. *Id.* at 1303. Also, in *Bennett*, this court recognized the tripartite standard and noted that *O'Neill* held that "a union's actions are *arbitrary* only if they fall outside a 'wide range of reasonableness.' " *Bennett*, 958 F.2d at 1436 (citing *O'Neill*, 111 S. Ct. at 1130) (emphasis added).[1]

Rather than using the tripartite standard, the panel in effect boils down the inquiry into a single factor: If the union acted so as to benefit the workers as a whole, then it did not breach its DFR. This is a by-product of the panel's use of a single rationality test. An examination of the opinion shows that it is replete with deference to majority rule. The panel said: "Negotiation means compromise." *Rakestraw*, slip op. at 10; "Bargaining has winners and losers." *Id.* at 12; "the majority is entitled to prevail." *Id.* at 13; and "If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm." *Id.* at 16. The panel says:

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[1] Even if the "mixed motive" analysis used elsewhere, *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), can be transferred in wholesale fashion to fair representation cases, the test was never applied by the district court. There is no basis for the conclusion that, absent an impermissible motive, the union would have followed the same course. As the panel appears to acknowledge in *Hammond* and *Rakestraw*, slip op. at 20, a mixed motive analysis can even be attempted only if one accepts the panel's collapse of the three-part test.

> [t]here are limits on what labor can do in response to management. Unions may not shoot strikebreakers, and we may assume that they may not negotiate for wage scales in the mirror image of managers' preferred systems . . . . Beyond these limits, workers may decide by majority vote where their interests lie.

Id. at 16.

All of this deference ignores that the concept of the duty of fair representation was created to protect minority interests, and by necessity, places a limit on majority rule. In the case that set forth the principle of the DFR under the Railway Labor Act, the Supreme Court said, "the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). As the Second Circuit noted in *Haerum v. ALPA*, "[t]he objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit." 892 F.2d 216, 221 (2d Cir. 1989) (citing *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974)).

Indeed, we rejected the idea of rote majority rule in *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 958 (1991). We stated that "[m]inority rights imply a limitation on the rights of the majority" and "the legal duty of fair representation is oriented toward the concerns of minorities . . . or a group of dissidents on the outs with the union leadership whom the leadership seeks to punish . . . ." *Air Wisconsin*, 909 F.2d at 216, 217. The court has also found that seniority decisions "may not be made solely for the benefit of a stronger, more politically favored group over a minority group." *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976).

The panel's analysis in *Rakestraw* and *Hammond* disregards all of this by deferring so heavily to majority interests. By not employing the tripartite standard, the

panel has deviated from the established law of the Supreme Court and the Seventh Circuit, and it has placed this circuit in conflict with other circuits. Every circuit that has faced this issue since *O'Neill* has accepted the tripartite standard and has recognized that *O'Neill*'s phrase "outside a wide range of reasonableness" applies only to the arbitrary prong. *See Carter*, 963 F.2d at 1078; *Colon Velez*, 957 F.2d at 940; *Ackley v. Local Union 337*, 948 F.2d 267, 267 (6th Cir. 1991); *Perry*, 943 F.2d at 619. The panel's opinion here cannot be squared with these cases. I therefore respectfully dissent from the denial of rehearing en banc.[2]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] As Judge Wood pointed out in *Ooley*, this circuit has already been criticized by the Supreme Court for its crabbed interpretation of the duty of fair representation. 961 F.2d at 1302 n.7 (citing *O'Neill*, 111 S. Ct. at 1134).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 8, 1993.

Before
Hon. KENNETH F. RIPPLE, *Circuit Judge*

Nos. 91-2285, 91-2416, 91-2417,
91-2502, 91-2503, and 91-2535

LEE RAKESTRAW, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Appellant,
Cross-Appellee.

On Petitions
for Rehearing
Decided
April 6, 1993

No. 91-2957

DAVID A. HAMMOND, et al.,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION and
TRANS WORLD AIRLINES, INC.,
Defendants-Appellees.

ORDER

The slip opinion issued on April 6, 1993 denying the petitions for rehearing en banc with a dissent from the denial is corrected as follows:

On page 2, paragraph 1 of the dissent, line 1, is amended to read:

> The district court held that Air Line Pilots Association ("ALPA") had breached its duty of fair representation ("DFR") in the *Rakestraw* case, and that it had not breached its DFR in the *Hammond* case.

[765 F.Supp. 474 (N.D. Ill. 1991)]

Lee RAKESTRAW, et al., Plaintiffs,

v.

UNITED AIRLINES, INC., and Air Line Pilots Association, International, Defendants.

No. 91 C 2325.

United States District Court,
N.D. Illinois, E.D.

May 30, 1991.

Strike replacement pilots brought action against airline and union seeking to enjoin airline and union from implementing seniority provision of collective bargaining agreement. The District Court, Conlon, J., held that: (1) union breached its duty of fair representation by championing cause of politically powerful group to detriment of replacement employees' interests; (2) replacement employees failed to establish that employer colluded with union in union's breach of duty of fair representation; (3) replacement employees failed to state claim for tortious interference with contract or for breach of third-party beneficiary rights; and (4) replacement employees were entitled to permanent injunction prohibiting execution of collective bargaining agreement's seniority provision.

So ordered.

* * * * *

Thomas R. Meites, Michael M. Mulder, Paul W. Mollica, Laurie A. Wardell, Meites, Frackman, Mulder & Burger, Chicago, Ill., for plaintiffs.

Robert A. Siegel, O'Melveny & Myers, Los Angeles, Cal., Duane M. Kelley, Robert W. Tarun, Winston & Strawn, Chicago, Ill., for defendant United Airlines, Inc.

Michael E. Abram, Stephen Presser, Peter Herman, Cohen, Weiss and Simon, New York City, Michael B. Erp, Katz, Friedman, Schur & Eagle, Chtd., Chicago, Ill., for defendant Air Line Pilots Ass'n.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

The issues presented in this action arise from a twenty-nine day strike in 1985 by defendant Air Line Pilots Association, International ("ALPA" or "the union") against defendant United Airlines, Inc. ("United"). Plaintiffs are 103 pilots who were hired by United to replace striking pilots. Plaintiffs seek to enjoin United and ALPA from implementing a provision of a new collective bargaining agreement that adversely affects plaintiffs' seniority rights. Plaintiffs allege that in negotiating the seniority provision of the new collective bargaining agreement, United and ALPA breached various sections of the Railway Labor Act ("the RLA"), 45 U.S.C. §§ 151-188. Plaintiffs also bring state law claims for breach of contract and tortious interference with contract against United and ALPA, respectively.

Pursuant to Fed.R.Civ.P. 65(a)(2), the parties stipulated to the consolidation of the preliminary injunction hearing

with a trial on the merits.[1] The case was tried before the court on May 20, 1991. After hearing the testimony of the witnesses, considering the arguments of counsel and reviewing the trial exhibits, including affidavits and deposition transcripts, the court enters the following findings of fact and conclusions of law under Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

The facts surrounding the 1985 ALPA strike against United are set forth in great detail in *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc. ("ALPA v. United Air Lines")*, 614 F.Supp. 1020, *modified*, 616 F.Supp. 849 (N.D.Ill. 1985) (Bua, J.), *aff'd in part and rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). Because the parties have adopted most or all of Judge Bua's factual findings, the court's factual findings shall refer to Judge Bua's opinion where appropriate.

I. The Parties

1. United is a Delaware corporation with its principal place of business in Elk Grove, Illinois. Stipulation of Uncontested Facts ("Stipulation") ¶ 2. United operates a commercial passenger airline system serving several hundred domestic and international destinations. Thus, United is a "carrier" as defined by the RLA, 45 U.S.C. § 181, and is subject to the RLA's provisions. *Id.*

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[1] The stipulation is conditioned upon plaintiffs' retaining their right to seek damages in the event the new seniority provision is implemented and later found to be invalid. Plaintiffs also reserved the right to present additional evidence and to seek damages on the claim that United improperly held back captains' bids from plaintiffs.

2. ALPA is the certified collective bargaining representative under the RLA for all pilots employed by United. Under ALPA's constitution and bylaws, ALPA may make policy decisions and enter into collective bargaining agreements only through the actions of the United-ALPA Master Executive Council ("the MEC"). The MEC is composed of representatives elected from each of United's pilot domiciles. Stipulation ¶ 3.

3. Plaintiffs are 103 "fleet qualified" United pilots who were hired as replacement pilots beginning May 17, 1985, the first day of ALPA's strike against United. Plaintiffs are deemed "fleet qualified" because at the time United offered plaintiffs employment, plaintiffs were already qualified under FAA regulations to operate United's aircraft as either captains or first officers. Each plaintiff was hired pursuant to an individual employment agreement with United. *Id.* ¶ 4.

II. Events Leading to the 1985 Strike

A. *The Group of 570*

4. In early 1984, United and ALPA commenced negotiations for a new collective bargaining agreement to replace the existing agreement, which was set to expire on April 1, 1984. *Id.* ¶ 5.

5. At the time United and ALPA began their negotiations, United had not hired pilots since the period between 1977 and 1979. Krop Aff. ¶ 3. During the 1984 negotiations, however, United foresaw the need for additional pilots. *Id.* Thus, beginning in the fall of 1984, United selected approximately 570 individuals ("the 570") to participate in a pilot training program. Stipulation ¶ 6.

6. Although United needed new pilots, it did not want to hire the 570 until after the completion of negotiations, because United hoped to take advantage of proposed lower wages for new employees. Krop Aff. ¶ 5. As a result, United established a new type of training program for the 570. The training program was intended to create a pool of trained pilot candidates for employment with United, if needed, within twelve months of graduation. *See* United Ex. 538. In exchange for advance training from United, each of the 570 signed a flight officer training agreement acknowledging that trainees were not United employees and would receive no compensation except $30 a day for expenses. *Id.*; Stipulation ¶ 7. The agreement also acknowledged that United could terminate the training without notice or liability. United Ex. 538.

7. Prior to 1984, United's practice had been to offer employment to trainees as "student pilots" at the time they began training. On or about the first day of training, the student pilots were placed on the United payroll and were assigned a pilot seniority date and a corresponding tentative seniority number. The student pilots received a final seniority number after completing training and a short period of FAA-supervised flying. Krop Aff. ¶ 4; Smith Decl. ¶ 6.

8. Thus, the training program for the 570 differed from past training programs in terms of salary and formal offers of employment. However, in terms of seniority, the 570 were treated like past student pilots; they received conditional seniority numbers based on their initial day of training. Smith Decl. ¶ 10; Krop Aff. ¶ 6.

9. On April 15, 1985, the National Mediation Board ("the NMB") notified ALPA and United that the collective bargaining negotiations had reached an impasse and that its mediation efforts had failed. Pursuant to the RLA,

the NMB proffered arbitration. Arbitration was not accepted. On April 16, 1985, the NMB released United and ALPA from mediation, permitting both ALPA and United to engage in lawful self-help under the RLA after a mandatory 30-day cooling off period expiring on May 17, 1985. Stipulation ¶ 8; 45 U.S.C. § 156.

10. After the release, United formally offered the 570 employment beginning May 17, 1985, the scheduled date for commencement of the ALPA strike. The original offers were not conditioned on the 570 reporting to work on May 17. Stipulation ¶ 9; United Ex. 522. However, as the strike date drew near, United informed the 570 that they would not be employed as United pilots unless they reported to work on May 17. Stipulation ¶ 9.

11. Meanwhile, ALPA urged the 570 to respect ALPA's picket lines and promised the 570 that ALPA would do everything it could to protect their employment rights at United. Smith Decl. ¶ 12.

B. *Fleet Qualified Pilots (Plaintiffs)*

12. United did not rely solely on the 570 to cross picket lines in the event of a strike. Prior to the strike, United also recruited fleet qualified pilots to work as permanent replacements for striking pilots beginning May 17, 1985. Stipulation ¶ 11. United solicited permanent replacements by advertising in various publications across the country. The advertisements stated, *inter alia*, that:

> Flight Crew positions may become available should a threatened strike by our Pilots occur. In such event, those employed will be permanent replacements for striking Pilots.
>
> Captains will be paid $75,000 per year, and First Officers will be paid $50,000 per year.

United Ex. 519; Pl.Ex. 9.

13. The advertisement invited qualified pilots to call a 900 number to receive additional information and to arrange an immediate interview. *Id.* The recorded message briefly explained United's position regarding the breakdown in collective bargaining negotiations. *See* United Ex. 520; Pl.Ex. 10. The message reiterated United's intention of hiring fleet qualified pilots to permanently replace striking pilots in captain and first officer positions at salaries of $75,000 and $50,000, respectively. The message assured candidates that "as a permanent replacement your employment as a Flight Officer will be secure regardless of any eventual settlement with ALPA." *Id.* The message stated that after the strike, replacement pilots would retain their salaries, but would not necessarily keep their positions as captains and first officers:

> Post strike operations will require you to bid for a vacancy which shall be assigned on the basis of your hiring date seniority. However, your salary plus any general increases would remain in effect until your seniority allows you to move up in status or equipment in a higher pay bracket under the new hire pay scale. We would not decrease your salary even if a settlement is reached and even if your responsibilities are changed.

Id. The guaranteed salary was a powerful inducement, because the salary offer of $75,000 or $50,000 was significantly higher than the salary other United pilots received for the same positions under the ALPA-United collective bargaining agreement. *ALPA v. United Air Lines*, 614 F. Supp. at 1047; Transcript of May 20, 1991 Hearing ("Hearing Tr.") at 49.

14. Candidates who applied to United for employment as fleet qualified pilots and who appeared to meet the job criteria were asked to interview and undergo various examinations and employment processing at United's offices.

Stipulation ¶ 13. During these interview sessions, the fleet qualified pilots were told that if hired, their pilot seniority date would be the date they commenced training (*i.e.* their hiring date), and that following the strike their seniority rights would be governed under the United-ALPA collective bargaining agreement. Krop Aff. ¶ 15. This meant that the permanent replacement pilots would be placed behind returning strikers on the seniority list. *Id.*

15. A United pilot's seniority number measures his or her relative seniority position on the United pilot system seniority list for purposes of seniority-based competitive bidding for pilot vacancies, monthly flight schedules and vacations under the pilot collective bargaining agreement. Pilots with a lower seniority number may outbid other pilots with higher seniority numbers for a variety of employment benefits including: (1) higher-paying pilot positions on better aircraft, (2) more desirable monthly flight schedules, (3) more desirable vacation dates, and (4) more desirable bases of operations. Stipulation ¶¶ 26-29.

16. Plaintiff Richard Lussow testified that he interviewed for a position as a permanent replacement pilot at United's offices on May 15 and 16, 1985. Hearing Tr. at 11. During a second interview on May 16, Lussow met with a United personnel officer and an individual from flight management in order to clarify the terms of United's employment offer. *Id.* at 11-12. Lussow was told that if he received an offer of employment, he would be offered the position of captain at an annual salary of $75,000. Lussow Dep. at 51. United personnel officers explained to Lussow that his seniority would begin to accrue on his first day of employment. Hearing Tr. at 12. Lussow was also told that if the 570 pre-hires failed to report to work on May 17, 1985, they would not be employees and there-

fore would not have any seniority. Hearing Tr. at 12. United personnel also stated that only a very small number of the 570 were expected to report to work on May 17. Lussow Dep. at 53; Hearing Tr. at 22. This was important to Lussow, because Lussow knew that if the 570 did report for work, they would be considered United employees with seniority rankings ahead of Lussow and other replacement pilots. Lussow Dep. at 55, 58; Hearing Tr. at 22.

17. Following this interviewing process, United offered employment to some candidates. Stipulation ¶ 13. These candidates received a full or conditional offer in writing from United. *See* Pl.Ex. 6; United Ex. 523. These written offers were form letters explaining to each pilot the terms of employment and where to report to work.

18. United's Exhibit 523 is an example of United's written offer of employment to fleet qualified pilots.[2] This particular offer was made to plaintiff George Spillman and dated May 16, 1985. The letter offers Spillman a captain's position at a salary of $75,000 a year, beginning May 17, 1985. The offer was conditioned upon an ALPA strike; in the event a strike did occur, the offer was invalid. In terms of promised job security, the offer stated:

> If your effective date of employment is after May 17 and should a settlement be reached with our Pilots' Union prior to your starting work, United will continue to honor its job offer commitment to you. . . . Your salary plus any general increases would remain in effect until your seniority allows you to move up in status or equipment in a higher pay bracket under the new hire pay scale. Your salary will not be de-

[2] For further examples of the standardized offer sent to fleet qualified pilots, *see* United's Ex. 522, 524, and 525.

> creased even if a settlement is reached and even if your responsibilities are changed.

Id. The offer stressed that United management would fully support fleet qualified pilots should they encounter any difficulties during their employment. In closing, United's offer stated:

> Richard Ferris, our Chairman and Chief Executive Officer, has given his assurance that any new hire pilot who comes to work for us during this strike will not be forsaken in any back to work agreement. We will live up to our commitment to you.

Id.

19. Plaintiff Lee Rakestraw received identical assurances of management's support and guaranteed pay in United's conditional offer of employment dated June 5, 1985. Pl.Ex. 6. Because the Spillman and Rakestraw offers contain identical promises of job security, guaranteed pay and management support, the court infers that each plaintiff who was hired as a fleet qualified permanent replacement pilot received a written offer of employment containing the same promises.[3]

20. Notably, the Spillman and Rakestraw employment offers do not contain any specific promises that the replacement pilots would receive seniority rights superior to striking pilots.

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[3] ALPA and United apparently concede that all plaintiffs received these promises. *See* Krop Aff. ¶ 16 (each pilot "was sent a form letter under the signature of one of [Krop's] subordinates confirming United's employment offer, and the terms of the pilot's employment"). As discussed below, ALPA and United take the position that these written offers contain the *only* promises United made to plaintiffs.

21. On April 24, 1985, prior to the strike, United's Senior Vice President-Flight Operations, Lloyd Barry, wrote to all United pilots explaining United's anticipated course of action in the event of a strike. United Ex. 521. The letter explained that United would be hiring permanent replacements for striking pilots. The letter stated that replacements hired as captains and first officers would receive annual salaries of $75,000 and $50,000, respectively. In terms of seniority, the letter provided:

> Current United pilots who continue to work shall be allowed to exercise their seniority over new hire Captains and First Officers as soon as operations permit. *New hire Captains and First Officers will be pay protected at the higher rate even though they may be later reassigned to lower positions.*
> I WANT IT CLEARLY UNDERSTOOK THAT WE WILL PROTECT THE RIGHTS OF THE PRESENT UNITED PILOTS WHO CONTINUE TO PERFORM THEIR FLYING DUTIES DURING A STRIKE. THIS COVERS BOTH PAY AND PERMANENT SENIORITY RIGHTS. WE WILL ALSO PROTECT THE PERMANENT EMPLOYMENT OF ANY NEWLY HIRED PILOTS. THIS COMPANY INTENDS TO REWARD THE LOYALTY OF THOSE PILOTS WHO HELP US KEEP THIS AIRLINE RUNNING.

Id. (emphasis added) (capitalized letters in original).

22. The Barry letter thus explained to all United pilots the terms of the offer to strike replacements: (1) they would receive a guaranteed salary of either $75,000 or $50,000, which would not be decreased after the strike; (2) they would not be fired after the strike; and (3) United would support those pilots who worked during the strike. Although the Barry letter promised current United pilots that their pay and seniority rights were protected, the letter made no representation about the seniority rights of the replacement pilots.

23. The fact that replacement pilots were not offered special seniority rights as a term of employment is further evidenced by a letter to United's former manager of Employment and Placement Services, Eugene Krop, from Ray Boyle, a United employee who assisted in recruiting fleet qualified pilots. Pl. Ex. 81. In the letter dated May 8, 1985, Boyle explained to Krop that the fleet qualified pilots objected to the fact that they would be placed behind the 570 on the seniority list on May 17, 1985. *Id.* Boyle stated that he thought United would have to offer more than just an increased salary in order to attract fleet qualified pilots to replace striking pilots. *Id.* However, there is no evidence that United changed its formal offers of employment to include preferential seniority rights for replacement pilots.

24. Indeed, Eugene Krop stated in his affidavit that before sending out the formal employment offers to fleet qualified pilots, United employment representatives were instructed to first telephone the candidate and to extend an oral employment offer limited to two specific terms: (1) permanent employment, and (2) guaranteed salary. Krop aff. ¶ 16. If the candidate accepted, United sent out the formal employment offer memorializing these terms of employment. *Id.* Seniority protection was not a part of the formal offer.

III. The Strike

25. On May 17, 1985, at 12:01 a.m., ALPA began a strike against United. Only 25 of the 570 reported for work on May 17, 1985, and approximately six others reported for work a few days thereafter. Stipulation ¶ 10.

26. Plaintiff George Spillman was hired by United as a fleet qualified captain on May 17, 1985. Hearing Tr. at

23, 24-25. After reporting to work on May 17, Spillman spoke with Bill Traub, United's director of training. *Id.* at 24. Spillman asked Traub about the status of the 570. Traub replied that the 570 had been training for several months, but that they had not been considered United employees. *Id.* at 25-26. Traub also told Spillman that the 570 were supposed to report for work that day, and since they had failed to do so, they would not be United employees. *Id.* at 26.

27. Spillman also had a conversation on May 17, 1985 with United president, James Hartigan. *Id.* This conversation took place in the hallway outside Traub's office. Hartigan told Spillman that the pre-hires who had not reported for work that day would *never* become United employees. *Id.* at 26-27. Spillman asked Hartigan what would happen if the 570 later returned to work. Hartigan replied that the 570 would be placed behind Spillman on the seniority list, because they would be coming to work after Spillman. *Id.* at 27.

28. Later that day, Spillman received and accepted a formal offer of employment from United. *Id.* at 27.

29. On June 5, 1985, plaintiff Richard Lussow went to United's Denver office to accept United's offer of employment as a permanent replacement pilot. *Id.* at 12-13. Lussow testified in his deposition that he and several other new hires asked United personnel officers how many of the 570 had come to work. Lussow was told that only a handful had reported for work; the rest of the 570 were not employees and therefore had no seniority. Lussow Dep. at 54-56.

30. Plaintiffs Lee Rakestraw and Ralph Pate were given similar information when they reported for their first day of work on June 7, 1985 and June 10, 1985, re-

spectively. *See* Rakestraw Aff. ¶ 6, and Pate Aff. ¶¶ 3, 5, attached as Exs. C and A to plaintiffs' memorandum in support of a preliminary injunction.

31. Over the course of the strike, approximately 219 fleet qualified pilots accepted employment. Stipulation ¶ 13. The pilot seniority dates of the fleet qualified pilots range from May 17, 1985 to June 28, 1985. *Id.*

32. During the strike, United also offered employment as student pilots, and eventually as second officers, to candidates who were not yet fleet qualified to be pilots on United's aircraft. Stipulation ¶ 14. By the end of the strike, approximately 320 persons had accepted these offers.[4] Unlike the fleet qualified pilots, the 320 student pilots were not hired pursuant to individual employment agreements. Although the student pilots were hired during the strike, they did not actually begin to work for United until after the strike. Thus, they received seniority dates ranging from July 1, 1985 to July 22, 1985. Stipulation ¶ 14.

33. A small number of applicants who were offered new hire positions during the strike refused to accept them because of the strike. Samolis Aff. ¶ 12. Approximately 15 of these pilots were eventually hired by United after the strike concluded. These pilots are called "the class of 1985." *Id.* The class of 1985 received seniority numbers based on the day they initially reported for work. Thus, the class of 1985 received seniority dates later than they would have received had they accepted United's earlier offer of employment. *Id.*

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[4] Thus, a total of 539 replacement pilots were hired during the strike. The complete group of replacement pilots have been labelled "the group of 539" or "the 539" in various documents filed in this case.

34. During the strike, Lussow attended two different meetings for new hires and other pilots who had crossed the picket lines. Hearing Tr. at 13-15. At the first meeting, Lloyd Barry, United's Senior Vice President-Flight Operations, told the assembled group that the 570 were not United employees and had no seniority because they did not report for work on the first day of the strike. *Id.* at 14. At the second meeting, Richard Ferris, United's Chairman of the Board, said that the 570 prehire trainees who did not report to work on May 17: (1) were not employees; (2) had no seniority; and (3) would never have seniority above the permanent replacement pilots. *Id.* at 15.

IV. 1985 Back to Work Agreement

35. After extensive negotiations supervised by the NMB, United and ALPA signed a back to work agreement on June 15, 1985, formally terminating the 29-day strike. Stipulation ¶ 15. The back to work agreement provided that striking pilots would be allowed to return to work and assume their pre-strike positions with normal seniority accrual. *ALPA v. United Air Lines*, 614 F.Supp. at 1038. ALPA and United agreed that there would be no reprisals or recriminations against pilots for either striking or crossing the picket lines. *Id.* at 1038-39. United refused to rehire the 570; the parties agreed that the issue of whether United was required to rehire the 570 would be litigated in federal court. *Id.* at 1039; Stipulation ¶ 16.

36. On July 15, 1985, United's Senior Vice President-Flight Operations, Lloyd Barry, sent a letter to all fleet qualified replacement pilots thanking them for their support during the strike. Pl.Ex. 84. Barry's letter states:

> I know that the decision you made to join this company as a Fleet Qualified pilot was not an easy one,

> but was embraced with great professional career expectations. I respect the courage and loyalty demonstrated by your decision.

Id. Barry went on to explain that United was vigorously defending its right to hire replacement pilots and the guaranteed salary package. Barry stated "[w]e are optimistic that our actions will be upheld, thereby allowing us to honor our commitments to you." *Id.*

V. Litigation Concerning the Strike

A. *Judge Bua's Order*

37. After the strike, ALPA sued United in federal court contending, among other things, that United violated the RLA by refusing to employ the 570 after the strike. After a ten-day bench trial, Judge Bua held that the 570 became United employees on May 17, 1985, and that United violated the RLA by refusing to recognize the status of the 570 as employees on that date. *ALPA v. United Air Lines*, 614 F.Supp. at 1043, 1051. Judge Bua ordered United to extend employee status to the 570 and to immediately assign the 570 who had completed training to the line pilot service. *Id.* at 1051. Judge Bua directed United to grant the 570 seniority as of May 17, 1985. *Id.*

38. Judge Bua later modified his order to require United to place the 570 on a preferential hiring list for all available positions in the future, instead of mandating immediate reinstatement of the 570. *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, 616 F.Supp. 849, 851-52 (N.D. Ill. 1985).

39. In compliance with the modified order, United placed the 570 on a preferential recall list, and recalled those who desired to continue employment with United,

beginning on November 9, 1985. Stipulation ¶ 16. Each recalled pilot from the group of 570 received a seniority date of May 17, 1985. Seniority within the recall group was ordered according to each pilot's first day of training in 1984 or 1985. *Id.* ¶ 17. In other words, while the entire recall group received a seniority date of May 17, 1985, the recalled pilots were placed on the seniority list relative to each other based on each pilot's initial training date.

40. On August 15, 1985, Lloyd Barry sent a letter to all pilots hired as replacements during the strike. The letter provided in relevant part:

> [W]e recognize that Judge Bua's decision has a profound impact on you. In that ruling, which we will also challenge on appeal, the Judge found that the [570] were in fact employees and were entitled to seniority dates of May 17, 1985. The obvious effect of this ruling, if not overturned on appeal, is to place those [570] pilots on the seniority list as of that date, ahead of the replacement pilots.
>
> The appeal process can be a lengthy one. In the meantime, however, be assured that United will stand behind those pilots to whom it committed permanent replacement positions. . . .

Pl.Ex. 59.

B. *The Seventh Circuit Decision*

41. On September 30, 1986, the Seventh Circuit reversed the district court on the issue of the 570's employment status. *Air Line Pilots Ass'n Int'l v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). Specifically, the Seventh Circuit held that as of May 17, 1985, the 570 were not "employees" as defined under the RLA,

and therefore United did not violate the RLA in conditioning the 570's employment on crossing picket lines. *Id.* at 911-17 (7th Cir. 1986). The court explained that:

> The definition of employee under the [RLA] makes it clear that a person must perform work for his employer under that employer's supervision to be deemed an employee. Members of the Group of [570] failed to perform any services for United and were hence never employees for the airline.

Id. at 913 n. 9.

42. Contrary to plaintiffs' repeated assertions, the Seventh Circuit did not address the issue of the 570's seniority.

43. On March 30, 1987, the Supreme Court denied ALPA's petition for certiorari. *ALPA v. United Air Lines*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). As a result, United claimed it was free to terminate the 570. Stipulation ¶ 18.

VI. The 1987 Letter of Agreement

44. Instead of immediately firing the 570, United entered into negotiations with ALPA to retain the 570 as United employees, but to adjust their seniority dates to November 9, 1985, the date United recalled the first of the 570 pursuant to Judge Bua's order. Samolis Aff. ¶¶ 4-7.[5]

45. In these negotiations, United took the position that if no agreement were reached with ALPA on the 570

[5] John Samolis currently holds the position of Vice President, Employee Relations at United. Samolis Aff. ¶ 1. Samolis represents United in its labor relations with various unions, including ALPA. *Id.*

issue, United would terminate them. *Id.* ¶ 6. ALPA believed that United management insisted on adjusting the seniority of the 570 because they wished to punish ALPA and the 570 for their role in the strike. Smith Decl. ¶ 19. However, under the RLA, ALPA had no right to strike over the issue. Samolis Aff. ¶ 6.

46. On April 3, 1987, United informed ALPA that it would immediately discharge the entire group of 570 unless ALPA entered into a collective bargaining agreement that would adjust the seniority of the 570. Stipulation ¶ 19.

47. Left with no alternative, ALPA acquiesced. Thus, on April 3, 1987, United and ALPA executed the 1987 letter of agreement setting forth the following terms:

a. United agreed to immediately extend employment offers to each member of the 570 for a pilot's position. United Ex. 527 ¶ 1.

b. United would adjust the seniority date of each member of the group of 570 from May 17, 1985 to November 9, 1985, the actual recall date of the first member of the 570. *Id.* ¶ 2.

c. ALPA agreed that the seniority dates and numbers assigned to the 570 would be final. In particular, ALPA agreed that:

> it will never seek to challenge [United]'s action in that regard in court or before an arbitrator, nor will it seek to raise the issue of the "Group of 570" relative seniority position as part of any future negotiations between [United] and [ALPA] regarding any subject whatsoever.

Id. ¶ 3.

d. As a condition of employment, each member of the 570 was required to sign an individual written document releasing United and ALPA from any and all liabilities relating to the 1987 letter agreement or to the 570's period of employment pursuant to Judge Bua's order. *See id.* ¶ 4 and accompanying "RELEASE."

e. ALPA agreed:

> to take extensive active measures to eliminate the residual tension between those pilots who struck and those who worked during the strike, including activities which might constitute reprisals or recriminations as a result of the 1985 ALPA strike (e.g., any worker lists, workplace ostracism or harassment).

Id. ¶ 5.

f. United agreed to take extensive active measures to restore a positive working relationship with all pilots, and to eliminate any activities that might constitute reprisals or recriminations as a result of the 1985 ALPA strike. *Id.* ¶ 6.

g. United and ALPA acknowledged that the 1987 letter agreement "fully, finally and forever" resolved all disputes between United and ALPA regarding the 570. United Ex. 527 at 1.

48. Three days after signing the 1987 letter agreement, Lloyd Barry sent a letter to all United pilots calling for reconciliation and asking each pilot to respect the terms of the 1987 letter agreement. Pl.Ex. 5. Barry's letter stated:

> Of all the issues relating back to the strike, the 570 has been among the last to be resolved, and certainly the most painful. We have always regarded the men and women in the group of 570 as valuable pilots, and it was truly unfortunate that they were

> caught in the middle while the courts decided the far-reaching institutional questions posed by ALPA and United. I ask that you honor the commitment that ALPA, as your representative voice, has made to put the war behind us.

Id.

49. Although ALPA contends that it was coerced into signing the 1987 letter agreement and that it never intended to abandon the 570 seniority issue (*see* Pl.Ex. 131), there is evidence that ALPA did at least initially intend to honor the 1987 letter agreement. On March 8, 1988, the Chairman of the UAL-MEC negotiating committee, Pat Austin, sent a letter to each member of the 570. Pl. Ex. 28. The letter acknowledged that many of the 570 still wanted ALPA to renegotiate the 570 seniority issue. However, the letter stated that:

> It was the decision of the Master Executive Council, articulated by Captain Dubinsky, that [ALPA], and its Officers, must and will abide by their agreements: to do otherwise would destroy our credibility and result in a questioning of the integrity of [ALPA] and its Officers.
>
> * * * * * *
>
> Maybe with 20/20 hindsight we all can develop other ways in which this problem could have been resolved, but based on what the parties had to deal with at the time, decisions were made and agreements were reched and we must live with those agreements in the same manner we would expect United to honor its agreements with [ALPA].

Id.

50. Nevertheless, it is clear that ALPA has always considered itself coerced into signing the 1987 letter agreement, and considered the agreement unfair punishment against those members of the 570 who honored ALPA

picket lines. Smith Decl. ¶ 19-21; George Aff. ¶ 5; Samolis Aff. ¶ 8. Indeed, it does appear that United sought to punish the 570 for striking. Under the 1987 agreement, 33 non-striking pilots from the 570 maintained seniority ahead of the replacement pilots. These 33 pilots maintained their seniority dates of May 17, 1985, while all striking 570 pilots had their seniority dates and corresponding numbers placed behind the replacement pilots. Smith Decl. ¶ 22.

51. Thus, despite the finality of the language in the 1987 letter agreement, from April 1987 to the present, ALPA has repeatedly and consistently informed United and United pilots that ALPA urgently desired to renegotiate the terms of the 1987 letter agreement and to restore the seniority dates of the 570 to May 17, 1985. Smith Decl. ¶ 21; George Dep. at 60-68; Pl.Exs. 13, 15, 16, 40, 45, 78, 119.

VII. The Colorado Litigation

52. In May 1988, the 570 filed a class action in Colorado state court against United for breach of contract and misrepresentation in connection with their relative seniority. *DeJean v. United Air Lines*, No. 88 CV 9474 (D.Colo. 1988). *See* Pl.Ex. 115 at 3. The 570 claimed that United promised they would be hired in order of seniority numbers assigned during their training period. *Id.* at 1.

53. The trial court granted United's motion for summary judgment on the grounds that: (1) *res judicate* precluded the 570 from litigating issues that could have been raised in the 1985 litigation before Judge Bua; and (2) the 570 were barred from litigating the seniority issue against United because they had signed individual releases absolving United from all claims regarding the 570's seniority status. *Id.* at 5-10.

VIII. Employee Stock Ownership Negotiations

54. Within days after signing the 1987 letter agreement, the MEC, headed by Dubinsky, proposed a plan for the pilots to buy United. A prominent reason for this plan was ALPA's dissatisfaction with United management's treatment of the 570 issue. *See* Pl.Ex. 22 at 3-4; Smith Decl. ¶ 25. United management rejected the pilots' offer. *See* Pl.Ex. 66.

55. For approximately two years after United's rejection of the first MEC proposal, ALPA continued in its efforts to enable United pilots and employees to buy United. Smith Decl. ¶¶ 25-26. The subject of restoring the seniority of the 570 was consistently raised during these negotiations. Smith Decl. ¶ 26; Pl.Ex. 13; George Dep. at 60-68.

56. In August 1989, an outside party attempted to purchase United. George Aff. ¶ 7. United management responded by joining forces with ALPA to create a joint buyout of United through an employee stock ownership plan ("the buyout plan"). *Id.* During United's negotiations with ALPA regarding the possible buyout plan, ALPA formally proposed that in the new collective bargaining agreement, the pilot seniority dates of the 570 should be adjusted to May 17, 1985. *Id.* After initially resisting, United agreed to this proposal. *Id.*; Pl.Ex. 15.

57. The proposal was never implemented, because the buyout plan between United and ALPA failed for lack of financing. George Aff. ¶ 8.

IX. 1991 Collective Bargaining Agreement

58. In April 1988, United hired its current Senior Vice President-Human Resources, Paul George. George Aff. ¶ 1.

At the time he joined United, George became aware of the extremely bitter relationship between ALPA and United resulting from the 1985 strike. *Id.* ¶ 2. George decided to place top priority on resolving any disagreements over the 1985 strike in order to restore normal, mutually productive relations between United and ALPA. To achieve this objective, George believed it was necessary to reach a new collective bargaining agreement with ALPA to replace the 1985 agreement, which became amendable on April 1, 1988. *Id.*

59. Shortly after joining United in 1988, George met with MEC chairman Rick Dubinsky to discuss United's relationship with ALPA. Dubinsky told George that United would not have labor peace, and that there would be no agreement on a new collective bargaining agreement, without first resolving the issue of the 570's seniority. *Id.* ¶ 3.

60. Over the next year and a half, George had several informal conversations with ALPA representatives who reiterated the position that the 570 should be granted seniority dates of May 17, 1985. *Id.* ¶ 4.

61. ALPA justified its position on several grounds. First, May 17, 1985 was the seniority date that the 570 would have received but for their decision to honor the ALPA picket line. *Id.* Historically, all other United pilots had received seniority dates based on the pilots' initial training date. ALPA believed that the 570 were unfairly punished solely because of their decision to strike. ALPA also told George that as the certified bargaining representative for the 570, ALPA had a duty to fulfill its promise to the 570 to protect their seniority rights. *Id.* ¶ 5.

62. According to George, he initially resisted ALPA's requests to renegotiate the seniority of the 570, because

he felt that United could obtain a new collective bargaining agreement without acquiescing in ALPA's demands. *Id.* ¶ 6. At the time, George understood ALPA's concerns, but concluded that since the battle over seniority had previously been resolved, the issue was best left alone. *Id.*

63. During the buyout negotiations, normal collective bargaining negotiations between United and ALPA were suspended. Smith Decl. ¶ 27; Stipulation ¶ 21. However, when it became clear in October 1990 that the last of the employee buyout proposals had failed, United urged ALPA to engage in immediate, expedited collective bargaining negotiations. *See* letter dated October 9, 1990 from John Samolis to Pat Austin, attached to Smith Decl. as ALPA Ex. G. *See also* Pl.Ex. 118.

64. On October 22, 1990, Dubinsky wrote to Paul George and demanded that United resolve the 570 seniority issue before commencing formal negotiations. Pl.Ex. 16. According to Dubinsky:

> The acceptable solution is well known to management. It is on the same terms as formally agreed to by [certain United management officials] (and approved by the UAL Board) in the management led [buyout] effort during the fall of 1989.

Id.

65. George responded to Dubinsky by stating that:

> I believe we all agree that the "570" and "Class of '85" are both sensitive issues and should be addressed promptly in a manner which is fair and equitable to all affected pilots.

Pl.Ex. 18. However, George refused to settle the 570 issue prior to negotiating. Instead, George proposed addressing the 570 issue together with the other issues in the collective bargaining negotiations. *Id.*

66. A subsequent exchange of letters resulted in ALPA agreeing to negotiate the 570 seniority issue along with the other issues in formal collective bargaining negotiations. *See* Pl.Ex. 120; Letter of November 6, 1990 from Dubinsky to George, attached as ALPA's Ex. G to Smith Decl. *See also* Pl.Ex. 40.

67. As negotiations between United and ALPA progressed, it became apparent that United was willing to grant ALPA's demand that seniority for the 570 and the class of 1985 be placed ahead of the replacement pilots, in exchange for ALPA concessions. For example, in a letter dated February 19, 1991 from the MEC to its "fellow pilots," Pat Austin gave the following status report on the negotiations:

> The issue of the 570/Class of '85 also remains to be resolved; we remain optimistic that a satisfactory resolution to this issue can be reached, however management places a high price tag on this item and there is a certain degree of time criticality involved.

Pl.Ex. 45.

68. In a confidential mediation session between ALPA and United on February 25, 1991, John Samolis of United expressed the view that the 570 issue would be solved, and that there "will be lawsuits no matter what." Samolis saw the issue as a "big chip" that had to have some ALPA concessions tied to it before United would agree. Pl.Ex. 48.[6]

69. In April 1991, United and ALPA tentatively agreed on all provisions of a new collective bargaining agreement,

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[6] United's objections to plaintiffs' Ex. 48 on grounds of relevance and hearsay are overruled.

subject to MEC ratification. Stipulation ¶ 25. As part of the proposed 1991 collective bargaining agreement, United and ALPA drafted a letter of agreement regarding the seniority of the 570 and class of 1985. *Id.*; Pl.Ex. 4; United Ex. 536. The new letter of agreement readjusts the pilot seniority and longevity of the 570 to May 17, 1985. *Id.* Seniority and longevity for pilots from the class of 1985 currently employed by United would be adjusted to the date on which each pilot would have commenced training. *Id.* The seniority and longevity adjustments are to have prospective effect only. *Id.* Paul George of United stated that the adjustment is reasonable, in that it remedies past punishment of the 570 for striking, and it grants seniority dates to the 570 based on the date they originally were offered employment, May 17, 1985. George Aff. ¶ 17.

70. On April 5, 1991, Dubinsky wrote a letter to John Busch explaining:

> [A]s you probably know by now, we have been deeply involved in contract negotiations culminating in a tentative agreement on most issues, late the evening of April 2, 1991.
>
> As part of that agreement, I am pleased to report that the company has agreed with ALPA to restore the "570" and "Class of 85" to their rightful seniority. As you should know, the reversal of the vindictive act that [United's former management officials] perpetrated on the United pilots in April 1987 has been among the highest objectives of the UAL-MEC. As no time did we loose (sic) faith with that objective as evidenced in the most recent agreement.

Pl.Ex. 78.

71. On May 9, 1991, the MEC ratified the tentative collective bargaining agreement; ALPA's president signed the agreement on May 10, 1991. Stipulation ¶ 25.

72. Effective June 1, 1991, the seniority provisions of the new collective bargaining agreement will adversely affect the group of 539, consisting of fleet qualified replacement pilots and new hire pilots who were hired as student pilots during the strike. Approximately 490 replacement pilots from the group of 539 are currently United pilots. Smith Decl. ¶ 37. Of these 490 pilots, 270 are now ALPA members. *Id.* Of the original group of 570, approximately 460 remain United pilots today. *Id.* ¶ 38. Under the 1991 agreement, the 33 pilots of the group of 570 who crossed the picket lines in 1985 will not be placed behind the remaining 570 striking pilots on the seniority list. *Id.* All 460 members of the group of 570 shall be placed ahead of the 490 members of the group of 539 on the seniority list; the 570 will receive seniority dates of May 17, 1985 and relative seniority numbers based on their initial day of training. *Id.*

73. United is now convinced that a readjustment of the seniority dates of the 570 is necessary in order to place all pilots in the position they would have been in had there not been a strike. *See* Pl.Ex. 57. Further, United contends that placing the 570 ahead of the replacement pilots on the seniority list will benefit all employees, including the replacements. George Aff. ¶ 19. The replacement pilots will keep their current positions, and receive improved benefits under the new collective bargaining agreement. *Id.* In addition, with a new agreement, United will be able to expand, thereby opening up additional promotion opportunities so that the negative effects of the seniority adjustment will be ameliorated. *Id.* United also asserts that this resolution will work to eliminate residual tension between pilots who worked during the 1985 strike and those who honored ALPA picket lines. *Id.*

X. ALPA's Attitude Toward Pilots Who Worked During the Strike

74. Despite United and ALPA's purported resolve to abolish any animosity between strikers and non-strikers, there is substantial evidence that union employees—and indeed the union itself—have expressed hatred and contempt for the replacement pilots and United pilots who crossed the picket line in 1985.[7] Pilots who worked during the strike continued to suffer the effects of the strikers' anger for nearly six years after the strike's end.

75. A letter from then-Senior Vice President of Flight Operations, Lloyd Barry, to each fleet qualified pilot, dated July 15, 1985, demonstrates United's awareness that replacement pilots were being harassed by pilots who had honored the picket line. Barry states in his letter:

> I am aware of the pressures you are under while you carry out your current assignment. We cannot regulate or enforce attitudes, but we are investigating all incidents and handling them appropriately. . . . Time is a great healer, but we are not going to sit idly by and allow you to take unnecessary heat while this emotional era slowly subsides. . . .

Pl.Ex. 84.

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[7] Plaintiffs submitted over 130 exhibits, many purporting to prove union hostility. United objects to statements made by ALPA representatives, and ALPA objects to statements made by United personnel. Of course, the court understands that any statements made by ALPA may not be attributed to United or used to prove United's wrongful conduct. The same principle applies to statements made by United personnel as to ALPA's alleged wrongful conduct. Thus, most of plaintiffs' exhibits are admissible over defendants' objections of relevance and hearsay. However, defendants' objections to plaintiffs' exhibit 134 are sustained. Exhibit 134 purports to represent a transcript from a televised program called "West 57th Street." This exhibit is inadmissible because it is hearsay, nor have plaintiffs established a foundation for the transcript.

76. Another example of the union's hostility towards pilots who worked during the strike is a letter addressed to "All Council 34 Pilots" from Patrick Flanagan, the chairman of local ALPA Council 34. In the letter dated July 24, 1985, Flanagan states:

> First, let's get one thing straight. Our issue is with the scab pilots, not the Company. Because we are the Company. Our wrath and rage should be properly directed towards those who were willing to take our jobs and our profession. There is no way we can ever forgive those people. . . .
>
> I will say it a thousand times before I am through. The best proven method of treating scabs is ostracism.

Pl.Ex. 85.[8]

77. In October 1987, ALPA amended its constitution to deny union membership to any pilot receiving compensation exceeding the established pilots' salary under the collective bargaining agreement. Pl.Ex. 100. This barred membership of the fleet qualified replacement pilots who received salaries of $75,000 or $50,000 under their individual employment contracts with United.

78. After amending the union's constitution, the MEC sent letters to the fleet qualified pilots asking them to relinquish any extra pay they received as a result of their individual employment agreements with United. *See* Pl. Ex. 95, 99.

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[8] ALPA argues that exhibit 85 is hearsay because the statements were not made by an authorized ALPA representative. The court infers that statements made by a local ALPA council chairman evidence the attitudes of ALPA and its members. This objection is overruled. Fed.R.Evid. 801(d)(2).

79. In a deposition taken in another case on June 1, 1988, Dubinsky, the chairman of the MEC, testified that "[t]he world knows that we intend to eliminate the fleet qualified pay on this property." Pl.Ex. 102 at 318. When asked to describe the fleet qualified United pilots, Dubinsky stated "[f]or the most part, they are the scabs that were hired during the strike of '85." *Id.* at 309.

80. In February 1989, Dubinsky sent letters to several fleet qualified pilots who had become union members after the strike. In each letter, Dubinsky stated:

> I have recently become aware that you have previously been granted membership in [ALPA] even though you may have been in violation of certain provisions of the Constitution and By-Laws, specifically [the section that prohibits] "Entering into an Employment Agreement or any Contract which may Injure the Association . . . I now formally demand you immediately repudiate your "personal employment agreement" with United Airlines and maintain your future employment with United solely pursuant to the provisions of the ALPA Collective Bargaining Agreement with United Airlines. . . .

Pl.Exs. 105-08.

81. When fleet qualified replacement pilots refused to repudiate their individual employment agreements, Dubinsky filed formal charges against them for violating the ALPA constitution. Pl.Exs. 109-112.

82. More subtle union hostility to the fleet qualified replacement pilots is evidenced in the September 1989 Labor Day edition of the "Bayliner," an official ALPA publication of Council 34. Pl.Ex. 114.[9] The cover of the

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[9] ALPA's objection to exhibit 114 is overruled for the reasons stated in note 8.

issue contains a cartoon drawing of a union pilot having a "Labor Day Dream." The dream is illustrated by a graveyard containing a tombstone that reads "50/75—1985-89." *Id.* The picture represents the union's dream of "death" to the fleet qualified pilots' extra pay.

83. The February edition of "Banner," the newsletter of ALPA's local Council 12, contains an article entitled "the 570." Pl.Ex. 41. In the article, a member of the group of 570 recounts the events of 1985 that gave rise to the seniority dilemma. The article describes the fleet qualified pilots as "mercenary soldiers-of-fortune," who "came on the property after answering ads promising them $50,000 or $75,000 a year. . . ." The author then quips, "I guess every man has his price." *Id.*

84. The Banner expressly states that "the opinions expressed in this publication do not necessarily represent official ALPA policy. . . ." *Id.* However, taken in connection with other evidence of union hostility, it is reasonable to infer that ALPA officers shared the hostility expressed in the Banner against fleet qualified pilots.

85. Plaintiffs' exhibit 77 belies ALPA's claim that the union never officially manifested contempt for the fleet qualified pilots. In this letter dated February 8, 1991, ALPA MEC chairman Dubinsky writes the following to George Raymond, a United pilot who works at United's Denver training center:

> George, next time you look in the mirror, remember that the face you see staring back belongs to an individual who ACTIVELY WORKED TO TRAIN FLEET QUALIFIED SCABS TO REPLACE HIS FRIENDS. I certainly won't forget.

Pl.Ex. 77 (capitalized letters in original).

86. Moreover, on March 9, 1991, ALPA Council 11 sent a letter to its members inviting them to a kick-off rally for proposed federal legislation that would make it illegal for employers to hire permanent replacement workers during a strike. The invitation explains:

> This is significant for us. At United, we have living proof of this contemptible practice. We have FLEET QUALS.

Pl.Ex. 123 (capitalized letters in original).

87. The most recent manifestation of union hostility toward fleet qualified pilots occurred as a result of the present litigation. On April 20, 1991, plaintiff Richard Lussow was in the pilot mail room in the San Francisco dispatch facility. Hearing Tr. at 15. Lussow stopped to read some literature that was posted on a locked bulletin board maintained by ALPA. *Id.*; ALPA Ex. 1015. The first page of plaintiffs' complaint in this case was tacked to the bulletin board under a sheet of glass. Hearing Tr. at 16. Next to the list of plaintiffs' names, someone had written in blue ink "Never forgive, never forget. Now is the time to show these people how we really feel." *Id.* Reading this scrawled message made Lussow feel as if the union ostracism following the 1985 strike was starting over again. *Id.*

88. On May 8, 1991, Dubinsky sent a memorandum to all ALPA field offices and council offices, stating:

> We are informed that comments concerning the "570" seniority litigation have been placed both inside and outside union bulletin boards. ALPA, of course, has not authorized or sanctioned any such comments, and the personal views of individual pilots do not in any way reflect ALPA's policies. . . .
>
> Please immediately pull all references to the seniority lawsuits from both the inside and the outside of our

> bulletin boards (or walls) at ALPA offices and those in dispatch offices. Yes, I know that we all have rights of free speech and that we do not control what individuals say, but let's pull down anything we see on this subject. I am asking that you accomplish this immediately. . . .

ALPA Ex. 1015. At the time Dubinsky drafted this memorandum, the parties in this case were in the midst of briefing plaintiffs' motion for a preliminary injunction, which is premised in part on allegations of union hostility toward fleet qualified pilots. Dubinsky's memorandum is a disingenuous effort to dispel the notion that the union harbors ill-will toward the fleet qualified pilots.[10]

89. ALPA has taken the following measures to alleviate tensions between striking and non-striking pilots:

a. ALPA hired someone to ensure that the union's official publications and communications do not contain inflammatory language regarding the 1985 strike. Hearing Tr. at 43-44.

b. ALPA appointed a pilot who worked during the strike to serve on ALPA's professional standards committee as a representative of non-striking United pilots. *Id.*

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[10] ALPA submits a "Summary of ALPA member data concerning the group of 539" in order to show that some of the pilots who were hired during the strike are ALPA members who also stand to suffer from the new seniority provision. ALPA Ex. 1012. However, plaintiffs' objections to this document are sustained. Exhibit 1012 was prepared on May 8, 1991, apparently for the purpose of this litigation. There is no foundation for this list of pilots. ALPA has not identified the preparer of the list or the source of the data. Additionally, plaintiffs' objections to exhibit 1012 are sustained on hearsay grounds.

c. ALPA's employee assistance program offers aid to any pilot who has encountered difficulties in employee relations. *Id.* at 44.

90. Considering the extensive evidence of animosity and tension between strikers and non-strikers, ALPA's efforts have failed to ease relations among pilots. Indeed, the evidence suggests that far from remaining neutral toward the group of 539, ALPA has nutured a six-year vendetta against the 539 and the fleet qualified pilots in particular. ALPA and its members have repeatedly shown contempt for the fleet qualified pilots, and this contempt has not been limited to the issue of fleet qualified pay, as ALPA suggests. It is impossible to separate the union's aversion to fleet qualified salary from the union's hostility toward fleet qualified pilots.

91. ALPA asserts that it has not engaged in discriminatory conduct in constantly pressing United to readjust the 570 seniority ahead of the replacement pilots. As evidence of ALPA's non-partisan motives, ALPA points to the fact that the 33 non-striking pilots from the group of 570 shall not be placed behind the striking 570 under the new collective bargaining agreement. ALPA argues that this fact eliminates any taint of discrimination against non-striking replacements. However, the evidence clearly demonstrates that ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly.[11] Instead, ALPA repeatedly lob-

[11] It bears noting that the 1991 collective bargaining agreement does not, as ALPA and United contend, grant the 570 seniority rights based on their first day of training. Instead, ALPA and United have agreed to grant the 570 seniority dates of May 17, 1985, the day they *would have been hired but for their decision to strike.* Thus, United and ALPA are clearly wrong in asserting that the 570 will now be treated like all United pilots by receiving seniority dates based on their first day of training.

bied *on behalf* of the group of 570 and the class of 1985 and *against* the fleet qualified pilots. The fact that ALPA has finally achieved its goal is not undermined by the fact that the 33 non-striking pilots from the group of 570 shall not have their seniority taken away from them under the 1991 agreement. Nearly 500 replacement pilots will be set back by approximately 460 positions on the seniority list as a result of ALPA's negotiating efforts.

92. In negotiating the current seniority adjustment, ALPA has discriminated against pilots who crossed ALPA picket lines and in favor of the 570 and class of 1985 pilots who did not work during the strike. While some of the adversely affected pilots are not ALPA members, they, like plaintiffs, chose to work during the strike and are therefore also the object of ALPA's contempt.

93. For six years following the 1985 strike, ALPA has consistently pushed to advance the interests of the 570 and the class of 1985, at the expense of pilots who worked during the strike. Only strikers will benefit from this seniority adjustment, while the 539 replacement pilots new hires will suffer.[12]

CONCLUSIONS OF LAW

I. Count I: Against United and ALPA for Breach of Duty of Fair Representation

A. *Applicable Law*

1. Under the RLA, a union representative, elected by a majority of employees, acts as the exclusive bargaining

[12] The 33 non-striking pilots from the group of 570 will be neither punished nor rewarded under the 1991 agreement. They will retain their current seniority.

agent for all employees in collective bargaining negotiations with the employer. 45 U.S.C. § 152, Fourth. Although a union representative is chosen by a majority of the employees, the bargaining agent has a duty to fairly represent the interests of all employees, regardless of union membership. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

2. A union's duty of fair representation extends to the union's actions in negotiating collective bargaining agreements. *Air Line Pilots Ass'n, Int'l v. O'Neill*, ____ U.S. ____, 111 S.Ct. 1127, 1135, 113 L.Ed.2d 51 (1991); *Air Wisconsin Pilots Protection Comm. v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 958, 112 L.Ed.2d 1045 (1991). Thus, in its negotiating capacity, a union must "serve the interests of all members [of the bargaining unit] without hostility or discrimination toward any [bargaining unit member], to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.*, quoting *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967) (citations omitted). A union's actions are not considered arbitrary unless they fall so far outside a "wide range of reasonableness" that they are "wholly irrational." *O'Neill*, 111 S.Ct. at 1136, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953).

3. The duty of fair representation does not require that a union achieve absolute equality among its members; the nature of collective bargaining may require a union to differentiate among employees in a variety of contexts. *Huffman*, 345 U.S. at 338, 73 S.Ct. at 686; *Haerum v. Air Line Pilots Ass'n*, 892 F.2d 216, 221 (2d Cir. 1989); *Alvey v. General Elec. Co.*, 622 F.2d 1279, 1287 (7th Cir. 1980). As the Supreme Court recently noted:

> Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. . . . Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.

O'Neill, 111 S.Ct. at 1135.

4. A union does not breach its duty of fair representation unless it "intentionally causes harm to an employee." *United Indep. Flight Officers v. United Air Lines*, 756 F.2d 1274, 1282 (7th Cir. 1985), quoting *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981).

5. Although union negotiations enjoy substantial deference from the courts, it is improper for a union "to offer to change contract practices of long standing arbitrarily, for the sole purpose of benefiting a stronger, more politically favored group over a minority segment of the union." *Alvey*, 622 F.2d at 1287 n. 8. *See also Air Wisconsin*, 909 F.2d at 217 ("an attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees . . . could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool").

6. Seniority rights are not vested; they are created through the collective bargaining process and derive their scope and significance from union contracts. *United Food & Commercial Workers Int'l Union v. Gold Star*, 897 F.2d 1022, 1026 (10th Cir. 1990); *Schick v. N.L.R.B.*, 409 F.2d 395, 398 (7th Cir. 1969); *Ferrara v. Pacific Intermountain Exp. Co.*, 301 F.Supp. 1240, 1243 (N.D.Ill. 1969). Thus, a union is free to renegotiate the method of allocating employee seniority rights, so long as the union's

position does not offend the duty of fair representation owed to all employees. *Barton Brands, Ltd. v. N.L.R.B.*, 529 F.2d 793, 798-99 (7th Cir. 1976); *Papcin v. Dichello Distrib., Inc.*, 697 F.Supp. 73, 80-81 (D.Conn.) *aff'd*, 862 F.2d 304 (2d Cir. 1988). When a new collective bargaining agreement abridges established seniority rights of a minority of employees, "the [u]nion must show some objective justification for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority." *Barton Brands*, 529 F.2d at 798-99.

7. An employer may be held jointly and severally liable for colluding with the union in conduct that constitutes a breach of the union's duty of fair representation. *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *United Indep. Flight Officers v. United Air Lines*, 572 F.Supp. 1494, 1508 (N.D.Ill. 1983) ("an employer may be held liable along with a union for breach of the duty of fair representation").

B. *United's and ALPA's Conduct in Negotiating the 1991 Collective Bargaining Agreement*

8. Although ALPA may have a legitimate goal in attempting to remedy United's past punishment of *some* of the strikers,[13] the Seventh Circuit has determined that United's actions toward the 570 and the class of 1985

[13] United did not punish all pilots who struck; established United pilots who refused to work during the strike were allowed to return to work after the strike with no adverse effect on their seniority. Stipulation ¶ 15; *ALPA v. United Air Lines*, 614 F.Supp. at 1038. Only the 570 and the class of 1985 were denied employment and seniority following the strike. *Id.*

were not illegal. *ALPA v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). Thus, United and ALPA were free to negotiate the 1987 letter of agreement placing the seniority of the 570 and class of 1985 behind the group of 539. Once that agreement was negotiated, however, ALPA breached its duty of fair representation by repeatedly lobbying United to again reverse the seniority order. In so doing, ALPA championed the cause of the politically powerful group of 570 to the detriment of a disfavored minority group. ALPA has unfairly abrogated the legitimately-negotiated seniority status that plaintiffs have relied upon for four years.

9. Overwhelming evidence demonstrates that ALPA bitterly opposed the very existence of fleet qualified pilots. Plaintiffs have therefore proven by a preponderance of the evidence that in negotiating the 1991 collective bargaining agreement, ALPA unfairly discriminated against the 539, and the fleet qualified pilots in particular.

10. It is of no consequence that there is a rational basis for granting the 570 and the class of 1985 seniority as of May 17, 1985. Indeed, United and ALPA concede that due to the unusual turn of events over the past six years, the seniority of the 570 and the class of 1985 could be logically determined in a number of ways. However, ALPA and United had previously negotiated the 1987 letter agreement as a permanent solution to the dispute over the 570's seniority. That "final" solution placed the seniority of the 570 and the class of 1985 *behind* the replacement pilots and new hires. All United pilots, including plaintiffs, relied on the 1987 letter of agreement as a final resolution to the seniority issue. ALPA has acted in bad

faith in negotiating to reverse the relative seniority rights of the 539 in the 1991 collective bargaining agreement.[14]

11. Plaintiffs have failed to establish by a preponderance of the evidence that United acted in bad faith or discriminated against plaintiffs in accepting ALPA's proposal. The evidence demonstrates that for several years after the strike, United staunchly protected the interests of the 539 to the extent possible. While there is some evidence showing that United has sought to achieve labor peace by sacrificing the seniority of the group of 539, United's current change in position is not a result of hostility or contempt for the 539 or plaintiffs in particular. Instead, United has agreed to adjust the seniority of the 570 as a result of ALPA's increased leverage in negotiating the issue over the years. Plaintiffs have not established by a preponderance of the evidence that United colluded with ALPA in ALPA's breach of the duty of fair representation.

II. Count II: Against United and ALPA for Breach of Duty to Maintain Agreements and Settle Disputes

12. Section 2 of the RLA imposes a duty on carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of

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[14] ALPA observes that plaintiffs cannot sue ALPA for breach of its promise in the 1987 letter agreement never again to raise the 570's seniority issue. *See Battle v. Clark Equip. Co.*, 579 F.2d 1338, 1347 (7th Cir. 1978) *overruled on other grounds, Rupe v. Spector Freight Systems*, 679 F.2d 685 (7th Cir. 1982). However, *Battle* does not prevent plaintiffs from seeking relief based on ALPA's breach of the duty of fair representation. In this regard, the fact that ALPA has completely ignored its commitment to never reopen the 570 seniority issue serves as evidence of ALPA's bad faith.

pay, rules, and working conditions, and to settle all disputes. . . ." 45 U.S.C. § 152, First.

13. Plaintiffs claim that in negotiating away plaintiffs' seniority positions, United breached its individual employment agreements with plaintiffs and thus United breached its duty to maintain agreements under the RLA. This claim lacks merit for two reasons. First, the duty to maintain agreements under the RLA applies only to "disputes between business organizations and labor unions that arise out of a collective bargaining agreement." *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1022 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1319, 108 L.Ed.2d 495 (1990), citing *Hendricks v. Airline Pilots Ass'n. Int'l*, 696 F.2d 673 (9th Cir. 1983). This provision of the RLA applies to collective bargaining agreements, not individual employment agreements. *Id. See also Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 575, 91 S.Ct. 1731, 1734, 29 L.Ed.2d 187 (1971) (supporting the view that RLA § 2, First, requires a carrier to "make and maintain agreements with the *union*") (emphasis added).

14. Second, as discussed below, plaintiffs' individual agreements do not promise them seniority ahead of the 570. Thus, even if the duty to make and maintain agreements did apply to individual agreements, United has not breached that duty by agreeing to place the seniority of the 570 ahead of plaintiffs.

15. Plaintiffs also claim that ALPA, in continuously pressuring United to adjust the seniority of the 570 after it had been settled by the 1987 letter agreement, breached its duty to "settle all disputes" under 45 U.S.C. § 152, First. Again, this provision of the RLA governs disputes between the union and the carrier, not between the union and the employees it represents. *Herring*, 894 F.2d at

1022 (pilots could not recover against Delta Airlines and ALPA under § 152, First "because th[e] case presents no dispute between Delta and ALPA").

16. In sum, plaintiffs fail to state a claim for relief under this section of the RLA.

III. Count III: Against United for Unlawful Discrimination

17. The RLA makes it unlawful for a carrier "to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ." 45 U.S.C. § 152, Fourth. Plaintiffs claim that in agreeing to ALPA's proposal, United unlawfully discriminated against plaintiffs on the basis of union membership.

18. The evidence clearly demonstrates that 270 of the group of 539 are currently ALPA members. Plaintiffs failed to establish by a preponderance of the evidence that the challenged seniority provision distinguishes between union pilots and non-union pilots. Judgment is entered in favor of United and against plaintiffs on Count III.

IV. Count IV: Against United and ALPA for Breach of Duty to Give Notice of Intended Change

19. The RLA requires that "[c]arriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . ." 45 U.S.C. § 156. Plaintiffs seek to hold ALPA and United liable under this provision for failing to serve written notice on plaintiffs of the proposed changes in seniority in the new collective bargaining agreement. However, the only par-

ties entitled to notice under this provision of the RLA are the bargaining representative and the carrier. Plaintiffs do not have a right to notice under 45 U.S.C. § 156. *McMullans v. Kansas, Oklahoma and Gulf Ry. Co.*, 229 F.2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918, 76 S.Ct. 710, 100 L.Ed. 1450 (1956); *Napier v. System Fed'n No. 91*, 127 F.Supp. 874, 890 (W.D.Ky. 1955). Plaintiffs offer no authority to support their right to enforce this notice provision of the RLA. Accordingly, plaintiffs fail to state a claim in Count IV.

V. Count V: Against United for Breach of Contract

20. Plaintiffs claim that they were guaranteed seniority ahead of the 570 in their individual employment agreements with United. However, the evidence demonstrates that guaranteed relative seniority was not a provision of the individual employment agreements signed by plaintiffs.

21. Plaintiffs argue that United orally promised that they would enjoy seniority ahead of the 570, and that these oral promises are enforceable. For several reasons, the court does not agree. First, plaintiffs have not shown that all 103 fleet qualified pilots were promised guaranteed relative seniority. At most, the evidence demonstrates that four of the 103 plaintiffs—Richard Lussow, George Spillman, Ralph Pate and Lee Rakestraw—reported to work and were told that the 570 had not shown up on May 17, 1985 and therefore would never be United employees. Thus, 99 plaintiffs have not met their burden of demonstrating that United made these oral promises.

22. Even assuming the existence of evidence that all 103 plaintiffs received such oral statements, United's statements do not constitute enforceable promises. It is clear that when plaintiffs came to work, both United and

plaintiffs *assumed* that the 570 would never become United employees and that they therefore would never have seniority above plaintiffs. Indeed, this assumption remained a reality until Judge Bua ordered United to hire the 570. However, an assumption is not a contractual promise. United told the 570 that they would receive hiring date seniority, and indeed plaintiffs' seniority numbers are based on their hiring dates. United never promised the fleet qualified pilots that they would be guaranteed seniority ahead of the 570, because United did not believe that the 570 would return to work. United was careful to limit its employment offer for fleet qualified pilots to two promises: (1) guaranteed salary, and (2) permanent employment. The evidence does not support the conclusion that United promised plaintiffs guaranteed seniority ahead of the 570 as part of the individual employment contracts.

23. In light of this conclusion, the court need not consider United's argument that the alleged individual seniority contracts would violate the RLA and would therefore be unenforceable.

VI. Count VI: Against ALPA for Tortious Interference with Contract

24. As a result of ALPA's conduct in pressing the seniority issue with United in collective bargaining negotiations, plaintiffs charge ALPA with tortious interference with plaintiffs' individual employment agreements. In order to recover for tortious interference with contractual relations, plaintiffs must prove:

(1) The existence of a valid and enforceable contract,

(2) The defendant's knowledge of the existing contract,

(3) Intentional and malicious inducement of the breach,

(4) The subsequent breach by the third person due to defendant's wrongful conduct, and

(5) Damage to the plaintiff[s].

Cross v. American Country Ins. Co., 875 F.2d 625, 627 (7th Cir. 1989), quoting *Zamouski v. Gerrard*, 1 Ill.App. 3d 890, 275 N.E.2d 429, 433 (1971).

25. Plaintiffs' claim is based on the existence of individual employment agreements between United and plaintiffs in which United promised plaintiffs seniority ahead of the 570. As explained in the foregoing discussion, plaintiffs have failed to prove the existence of contractual promises regarding seniority. Accordingly, plaintiffs' claim for tortious interference fails.

26. In any event, plaintiffs' claim against ALPA for breach of the duty of fair representation fully encompasses plaintiffs' state law claim for tortious interference with contract. Thus, plaintiffs' claim for tortious interference with contractual relations is preempted by the RLA. *See Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170-71 (4th Cir.) (where state claim of tortious interference with contract is "essentially identical to the duty of fair representation claim, . . . the potential conflict between remedies and administration [of federal and state law] are too great to permit the state claims to stand"), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985). *Accord, Johnson v. United Food & Commercial Workers*, 828 F.2d 961, 967 (3d Cir. 1987).

27. In short, plaintiffs' sole remedy against ALPA for its conduct in renegotiating the seniority rights of the 570 is a claim for breach of the duty of fair representation.

Judgment is entered in favor of ALPA and against plaintiffs on Count VI.

VII. Count VII Against United and ALPA for Breach of Third Party Beneficiary Rights

28. Plaintiffs claim that they are common law third party beneficiaries of the provisions in the 1987 letter agreement restricting future negotiations over the 570 issue.[15] According to plaintiffs, United and ALPA breached this agreement by renegotiating the seniority status of the 570.

29. United and ALPA contend that the court lacks jurisdiction over this claim because the 1987 letter agreement is the product of collective bargaining between ALPA and United. In order to assess the merits of plaintiffs' third party beneficiary claim, the court would be required to interpret the collective bargaining agreement to determine whether plaintiffs actually were intended third party beneficiaries. ALPA and United point out that under the RLA, all claims involving the interpretation or application of collective bargaining agreements constitute "minor disputes" falling within the exclusive jurisdiction of the System Board of Adjustment, the parties' arbitration panel. 45 U.S.C. § 184; *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-04 and n. 4, 109 S.Ct. 2477, 2480-81 and n. 4, 105 L.Ed.2d 250 (1989); *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 745 (7th Cir. 1987) (interpretation of an existing contract is a minor dispute that must be referred to binding arbitration). *Ac-*

[15] Although the complaint alleges that plaintiffs are intended third party beneficiaries of the 1985 back to work agreement, plaintiffs have abandoned this claim in their briefs.

cord, Chicago and Northwestern Transp. v. Local Union No. 214, 829 F.2d 1424, 1427 (7th Cir. 1987). Thus, defendants argue that the court lacks jurisdiction to decide plaintiffs' third party beneficiary claim.

30. Although plaintiffs' claim is properly characterized as a minor dispute, this claim falls within an exception to the rule granting exclusive jurisdiction to the arbitration panel. This exception applies when:

> the employee has not only a dispute with the employer involving interpretation of the collective bargaining agreement, but also a claim against the union for breach of the union's duty of fair representation. In that situation, the employee may bring a "hybrid" action alleging claims against both the union and the employer [for breach of contract].

Trial v. Atchison, Topeka & Santa Fe Ry. Co., 896 F.2d 120, 123 (5th Cir. 1990), citing *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 328-29, 89 S.Ct. 548, 550-51, 21 L.Ed.2d 519 (1969). Because plaintiffs charge ALPA with breach of the duty of fair representation, the exception for "hybrid" actions applies to plaintiffs' claim of breach of third party beneficiary rights. This court may adjudicate the merits of plaintiffs' claim in Count VII.

31. United and ALPA also argue that the RLA preempts any claim for breach of third party beneficiary rights. The court need not decide that issue, for even assuming plaintiffs' claim is not preempted by the RLA's duty of fair representation, plaintiffs have not demonstrated that they are intended third party beneficiaries of the 1987 collective bargaining agreement. Plaintiffs cannot point to any language in the agreement that demonstrates an intent by United or ALPA to create a promise enforceable by the fleet qualified pilots. Indeed, plaintiffs are not even mentioned in the document. It is clear

that ALPA never intended to benefit plaintiffs by agreeing to place the 570 behind plaintiffs on the seniority list in the 1987 letter agreement. To the contrary, the overwhelming evidence shows that ALPA executed the agreement because it was the only way ALPA could prevent United from firing the 570. Thus, plaintiffs were not intended third party beneficiaries of ALPA's promise never again to raise the 570 issue.

32. Further, in the 1987 letter agreement, *ALPA promised United* that ALPA would never seek to reopen the 570 issue; there was no corresponding obligation on United's part. Thus, even assuming plaintiffs were third party beneficiaries of the 1987 letter agreement, United was not precluded from renegotiating the 570 issue. *See United Steel Workers v. Rawson*, ____ U.S. ____, 110 S.Ct. 1904, 1913, 109 L.Ed.2d 362 (1990) (employees may not sue union to enforce promise made by employer in a collective bargaining agreement because "third party beneficiaries generally have no greater rights in a contract than does the promisee").

33. In sum, the court concludes that plaintiffs were not third party beneficiaries of the 1987 letter agreement. Thus, judgment is entered in favor of United and ALPA and against plaintiffs on Count VII.

VIII. Remedy

34. The RLA contemplates injunctive relief, as well as monetary damages where appropriate, for breach of a union's duty of fair representation in negotiating a discriminatory contract. *Steele*, 323 U.S. at 207, 65 S.Ct. at 234.

35. In Count I, plaintiffs seek to permanently enjoin United and ALPA from executing the seniority provision

of the 1991 collective bargaining agreement that places the 570 and the class of 1985 ahead of plaintiffs on the seniority list.

36. Permanent injunctive relief is appropriate if: (1) plaintiffs have prevailed on the merits of their claim; (2) plaintiffs have no adequate remedy at law; (3) the balance of equities favors granting an injunction; (4) the public interest is served. *Scruggs v. Moellering,* 870 F.2d 376, 378 (7th Cir.), *cert. denied,* ____ U.S. ____, 110 S.Ct. 371, 107 L.Ed.2d 357 (1989); *National Organization for Women v. Operation Rescue,* 726 F.Supp. 1483, 1496 (E.D.Va. 1989), *aff'd,* 914 F.2d 582 (4th Cir. 1990) *cert. granted,* ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991); *Travellers Int'l AG v. Trans World Airlines, Inc.,* 722 F.Supp. 1087, 1096 (S.D.N.Y. 1989).

37. Plaintiffs have satisfied the standards for a permanent injunction. Plaintiffs have prevailed on the merits of their claim that ALPA breached its duty of fair representation in negotiating the seniority provision of the 1991 collective bargaining agreement. The new seniority provision would clearly impose irreparable injury on plaintiffs. The value of the threatened loss of seniority benefits is speculative and is not conducive to remedy through the award of monetary damages. Thus, plaintiffs have no adequate remedy at law.

38. In addition, the balance of harms favors an injunction to preserve plaintiffs' current seniority rights. An injunction would not cause hardship on United or ALPA. While the injunction clearly prevents the 570 from attaining seniority ahead of plaintiffs, the court has concluded that the 570 may not achieve this seniority adjustment through ALPA's breach of the duty of fair representation. On the other hand, without injunctive relief, plain-

tiffs stand to lose immeasurable future employment benefits that they have been anticipating for four years based on their seniority positions established in the 1987 letter agreement between ALPA and United. Finally, an injunction would further the public policy embodied in the RLA of ensuring that a union fairly represents all members of the collective bargaining unit.

CONCLUSION

Defendant Air Line Pilots Association, International breached its duty of fair representation to plaintiffs. Accordingly, judgment is entered on Count I in favor of plaintiffs and against defendant Air Line Pilots Association, International. A permanent injunction shall issue barring execution of the seniority provision of the 1991 collective bargaining agreement between defendants United Airlines and Air Line Pilots Association, International.

Judgment is entered in favor of Air Line Pilots Association, International and against plaintiffs on Counts II through VII. Judgment is entered in favor of defendant United Airlines, Inc. and against plaintiffs on all counts.

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No. 92-1798

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OCTOBER TERM, 1992

LEE RAKESTRAW, *et alia*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and UNITED AIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION *and* BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, URGING THAT A WRIT OF CERTIORARI BE ISSUED

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Pursuant to Rule 37.2 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners, urging that a writ of certiorari be issued. Respondent Air Line Pilots Association, International ("ALPA") has refused to consent to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation ("Foundation") is a non-profit, charitable organization formed to provide free legal assistance to individual employees who, as a consequence of their subjection to compulsory-unionism arrangements, have suffered violations of their right to work; freedoms of association, speech, and religion; right to procedural due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States.

To this end, the Foundation has supported major constitutional cases involving the right of employees to avoid compulsory-unionism arrangements, including *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. BRAC*, 466 U.S. 435 (1984); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Association*, ____ U.S. ____, 111 S. Ct. 1950 (1991). The Foundation has also supported landmark litigation to protect the rights of employees under the "duty of fair representation", such as *CWA v. Beck*, 487 U.S. 735 (1988). In addition, the Foundation is even now supporting lawsuits specifically against ALPA (and in some instances respondent United Air Lines also)—including *Krantz v. ALPA*, No. L-108865 (Cir. Ct., Fairfax Cty., Virginia); *Belena v. ALPA*, No. L-121111 (Cir. Ct., Fairfax Cty., Virginia); *Falcon v. ALPA*, No. L-12113 (Cir. Ct., Fairfax Cty., Virginia); *Crawford v. ALPA*, No. 88-2083 (4th Cir., *en banc* decision handed down 28 April 1993); and *Beckett v. ALPA*, No. 92-7029 (D.C. Cir., oral argument held 20 April 1993).

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Court of Appeals for the Seventh Circuit would (in that Circuit) and could (as a precedent applied in other jurisdictions) seriously undermine the duty of fair representation, thereby radically expanding the occasions and ambit for injustices arising out of compulsory unionism.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

The Foundation recognizes that petitioners will ably argue their own personal interests in having this Court issue a writ of certiorari. Yet, by naturally focussing on their own circumstances, petitioners may not sufficiently emphasize aspects of the Court of Appeals' decision that flagrantly disregard the *constitutional* genesis and thrust of the duty of fair representation. Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the significance of the Court of Appeals' decision, and on the need for this Court's review of that decision by writ of certiorari.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

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No. 92-1798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LEE RAKESTRAW, *et alia*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and UNITED AIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS, URGING THAT A WRIT OF CERTIORARI BE ISSUED

INTRODUCTION

Pursuant to a motion, annexed hereto, for leave to file under Rule 37.2 of the Rules of this Court, the National Right to Work Legal Defense Foundation ("Foundation") submits this brief *amicus curiae* in support of petitioners, urging that a writ of certiorari be issued.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be granted, because the Court of Appeals has reduced to a single *de minimis* "rational-basis" test the tripartite standard of "arbitrary, discriminatory, or bad-faith" conduct that this Court has applied in every duty-of-fair-representation ("DFR") case from *Steele*[1] through *O'Neill*.[2] Moreover, inasmuch as the conduct of respondent Air Line Pilots Association ("ALPA") was found to have been undertaken both for a discriminatory purpose and in bad faith, in retaliation against petitioners for their exercise of the fundamental First-Amendment right not to associate with the union in a strike, the Court of Appeals' contraction of the DFR to a mere "rational-basis" standard draws into question the constitutionality of the Railway Labor Act's scheme of exclusive representation,[3] as this Court in *Steele* long ago warned would occur if a meaningful DFR were not interpolated into the statute.[4]

Unless reversed here, the Court of Appeals' decision will predictably foster attempts by unions to trivialize the DFR, to the detriment of all employees whose subjection to exclusive representation exposes them to the ill will of union officials or groups of co-workers who influence union policies.

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[1] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[2] ALPA v. O'Neill, __ U.S. __, 111 S. Ct. 1127 (1991).

[3] Section 2, Fourth, 45 U.S.C. § 152, Fourth.

[4] *See* 323 U.S. at 198-99.

ARGUMENT

The petition for a writ of certiorari should be granted, because the Court of Appeals' decision reduces to a toothless test of "mere rationality" the tripartite standard of "arbitrary, discriminatory, or bad-faith" conduct that this Court has mandated in its DFR cases from *Steele* through *O'Neill*—with three principal unacceptable effects:

◆ *First*, the Court of Appeals' decision resolves "a federal question in a way that conflicts with applicable decisions of this Court"[5] in a manner that reflects a callous disregard, or even disdain, for this Court's reasoning.[6]

◆ *Second*, unless reversed, the Court of Appeals' decision will particularly aid and comfort unions intent on misusing their powers of exclusive representation[7] to discriminate invidiously against nonunion or dissident union-member employees, as ALPA did here.

◆ *And third*, unless reversed, the Court of Appeals' decision—and the promotion of it by self-interested unions—will likely infect the general run of DFR cases throughout the country, undermining to the point of collapse that duty as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law",[8] and thereby drawing into most serious

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[5] Rule 10.1(c) of the Rules of this Court.

[6] *E.g.*, the Court of Appeals repeatedly denigrates this Court's tripartite DFR standard as composed of mere "conclusions", "epithets", "labels", "buzzwords", "slogans", and "empty" terminology. *See* Rakestraw v. United Air Lines, 981 F.2d 1524, 1530, 1532, 1533 (7th Cir. 1992).

[7] Under Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth; and National Labor Relations Act § 9(a), 29 U.S.C. § 159(a).

[8] Vaca v. Sipes, 386 U.S. 171, 183 (1967).

question the constitutionality of the Railway Labor Act's scheme of exclusive representation.

I. The Court of Appeals eviscerates the tripartite standard that this Court has mandated in its duty-of-fair-representation cases from *Steele* through *O'Neill*.

A. The Court of Appeals' decision destroys the tripartite DFR standard by double-minded reasoning:

◆ On the one hand, the Court of Appeals concedes that the alleged "rationality" of ALPA's actions is not enough to immunize the union from a DFR claim—because, although "'[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit'", the union must always act "'in complete good faith and [with] honesty of purpose in the exercise of its discretion'", and "'owes complete loyalty to the interests of *all* who it represents'", "'without hostility to any'".[9] Moreover, the Court of Appeals recognizes that ALPA may not "take away the seniority of some employees for no reason other than * * * that they opposed the union's leadership", that ALPA "may not sell an employee down the river * * * for a reason forbidden on substantive grounds, such as * * * internal union politics", and that "[e]mployees have a statutory right * * * freely to oppose unions * * * , so the organized workers may not penalize those who prefer individual to collective decision-making".[10] And the Court of Appeals admits *sotto voce* that ALPA did, in fact, impose "a penalty" on the Group of 539 to which petitioners belonged.[11]

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[9] 981 F.2d at 1530, *quoting* Ford Motor Co. v. Huffman, 345 U.S. 330, 337, 338 (1953) (emphasis in original).

[10] 981 F.2d at 1530.

[11] *Id.*

◆ On the other hand, however, the Court of Appeals argues that a "penalty" is permissible if the union's acts "may be characterized * * * as *normal efforts to provide a level playing field for all workers*"[12]—and, through a distortion of *O'Neill*, concludes that ALPA's discrimination against petitioners may be so "characterized" if "a rational person might believe" that that discrimination "serve[d] the interest[s] of the [bargaining-unit] as a whole" and was "rationally related to a legitimate [union] objective".[13] The Court of Appeals then disregards the findings of the District Court—"none of which", it admits, "is clearly erroneous"[14]—that ALPA acted discriminatorily and in bad faith towards petitioners, and accepts the grounds ALPA asserts for that malevolent discrimination as "rational" on the basis of shopworn slogans from the ideology of compulsory unionism.

Thus, overall, the Court of Appeals affects concern for the DFR, while disembowelling it. Although this Court's tripartite standard requires separate inquiry into "arbitrary", "discriminatory", and "bad-faith" union conduct, the Court of Appeals' decision licenses a miscreant union to dodge liability if its lawyers can caricature a "rational person" who "*might* believe" that the union was advancing some amorphous, question-begging goal such as "the solidarity of labor"[15]—even if, as proven here, "ALPA's leadership * * * detested the strike-breakers and wanted revenge, by means fair or foul"; and "[t]his loathing played a role in the union's efforts to increase the seniority of the Group of 570, which would demote the fleet qualified pilots".[16]

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[12] *Id.* (emphasis supplied). Of course, this merely poses the further question of what constitutes such "normal efforts".

[13] *Id.* at 1532.

[14] *Id.* at 1534.

[15] *See id.* at 1532 (emphasis supplied).

[16] *Id.* at 1534.

B. No fair reading of *O'Neill* licenses such indulgence. *O'Neill* explicitly held that "a union breaches its duty of fair representation if its actions are *either* 'arbitrary, discriminatory, *or* in bad faith' ", adding that this Court "ha[s] repeatedly identified *three* components of the duty".[17] Although *O'Neill* found no "arbitrary" conduct under the facts there presented, it treated challenges to ALPA's allegedly "discriminatory" and "bad-faith" conduct as *separate* issues.[18] Moreover, although *O'Neill* held in principle that a union's conduct is "arbitrary" "only if it can be fairly characterized as so far outside a 'wide range of reasonableness' * * * that it is wholly 'irrational' ", in practice it emphasized "the importance of evaluating the rationality of a union's decision in the light of both the facts and the legal climate that confronted the negotiators at the time the decision was made"[19]—a technique the Court of Appeals eschews, and that could hardly support its decision, where the contemporary facts showed that "ALPA's leadership * * * detested the strike–breakers and wanted revenge", where the replacement pilots "were harassed in and out of the cockpits—with the active and thoroughly illegal support of ALPA's leadership", and where "ALPA paid through the nose for a change in the seniority table" discriminatorily disfavorable to petitioners.[20]

II. The Court of Appeals has no basis for applying only an "arbitrariness" test to ALPA's conduct, as the record establishes discrimination and bad faith beyond peradventure.

The Court of Appeals' limitation of its DFR analysis to the "arbitrariness" test is inexplicable, because the record overwhelmingly evidences ALPA's discriminatory purpose and bad faith.

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[17] __ U.S. at __, __, 111 S. Ct. at 1130, 1134 (emphasis supplied).

[18] *See id.* at ___ n.6, ___, 111 S. Ct. at 1133 n.6, 1137.

[19] *Id.* at __, 111 S. Ct. at 1136.

[20] 981 F.2d at 1534, 1529, 1536.

A. ALPA's *vendetta* against petitioners exhibits the razor-sharp outlines of a melodrama oozing with perceived betrayal, hatred, and revenge—a dissonant *Cavelleria Rusticana* of "the friendly skies". After the union duplicitously "took the best offer United [Air Lines] was willing to make",

> ALPA's leaders promised guerrilla warfare against the fleet qualified replacement pilots, and, if need be to get the 219 replacements, against the entire Group of 539, even though the 320 student pilots had not crossed the picket lines. The 219 were harassed in and out of the cockpits—with the active and thoroughly illegal support of ALPA's leadership * * * .[21]

> ALPA's leadership * * * detested the strike–breakers and wanted revenge, by means fair or foul. This loathing played a role in the union's efforts to increase the seniority of the Group of 570, which would demote the fleet qualified pilots. Giving the Group of 570 seniority from May 17, 1985, *also* demoted the 320 trainees, none of whom crossed the picket lines and many of whom have joined the union, but * * * the union was willing to pay this price to get back at the reviled 219 replacement pilots.[22]

Indeed, ALPA so "detested", "loath[ed]", and "reviled" the 219 replacement pilots (including petitioners) that it "paid through the nose for a change in the seniority table", forking over to United "concessions worth $200 million"[23]—also at the expense, of course, of the hated 219 replacement pilots it intended especially to injure.

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[21] *Id.* at 1529.

[22] *Id.* at 1534 (emphasis in original).

[23] *Id.* at 1536, 1529.

To say (as does the Court of Appeals) that characterizing ALPA's conduct as "discriminatory" is at best to "invok[e] a slogan"[24] turns a blind eye to this salient reality.

B. ALPA's and its members' conduct also reeks with cynically calculated bad faith. Although, in accepting "the best offer United was willing to make",

> ALPA promised that "it will never seek to challenge [United's] action...in court or before an arbitrator, nor will it seek to raise the issue of the 'Group of 570' relative seniority position as part of any future negotiations...regarding any subject whatsoever"[,][25]

ALPA never intended to abide by its word—instead, immediately "promis[ing its members] guerrilla warfare against the fleet qualified replacement pilots", giving "active and thoroughly illegal support" to harassment of the 219 replacements, and at its first opportunity in renewed negotiations with United "rais[ing] the issue of the 'Group of 570' relative seniority" to the planned detriment of petitioners.

Moreover, the influential union members whose "[r]ancor * * * drove ALPA and United back to the [negotiating] table"—the Group of 570—were no more disposed to honor their pledges than was ALPA. Although "[e]very working member of the Group of 570 signed a document releasing both United and ALPA from all liability" for the initial agreement that waived further negotiations on their seniority, the Group of 570's later obstreperous misbehavior finally forced United to "c[o]me around to the view that efficient operation of the airline required peace

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[24] *Id.* at 1532-33.

[25] *Id.* at 1528-29.

with ALPA, and that the price of peace was to reverse the seniority positions of the Groups of 570 and 539".[26]

To say (as does the Court of Appeals) that characterizing this conduct as undertaken in "bad faith" is not useful because "[s]logans can be mustered on all sides"[27] is to pretend that the cause of peace cannot be served by identifying the aggressor in a conflict.

III. The Court of Appeals' claim that ALPA's conduct was "rational" rests on mere slogans.

Although the Court of Appeals inveighs against the use of "slogans", "labels", "buzzwords", "epithets", and other "empty" terminology when impugning this Court's tripartite DFR standard,[28] it itself seizes on the merest of slogans to color ALPA's actions as "rational". This approach is improper, for two reasons:

A. *First*, the DFR is of *constitutional* dimension. In *Steele*, this Court recognized that, if the Railway Labor Act confers upon a union designated as an exclusive representative[29] the plenary power

> to create the seniority rights of [minority] employees and to destroy them * * * without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross * * *, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its

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[26] *Id.* at 1529.

[27] *Id.* at 1530.

[28] *See id.* at 1530, 1532, 1533.

[29] Under Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth.

> power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on [minority employees] the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the [union's] own members, we must decide the constitutional questions * * * .[30]

In the instant case, the right of petitioners upon which ALPA has infringed is also of *constitutional* dimension: to wit, the First-Amendment right of nonassociation with a union in its concerted activities (a strike)—in retaliation for the exercise of which right ALPA discriminatorily negotiated a reduction in petitioners' seniority.[31]

And, contrary to the apparent assumption of the Court of Appeals, nothing is clearer than that the invocation of mere

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[30] 323 U.S. at 198-99. *Accord*, *id.* at 208 (Murphy, J., concurring):

> The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority * * * the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment * * * .

[31] This right of nonassociation is also protected under the Railway Labor Act itself. *See* § 2, Fourth, 45 U.S.C. § 152, Fourth.

labels or slogans cannot control the decision of legal issues of constitutional dimension.[32]

B. *Second*, the particular slogans reliance on which the Court of Appeals preferred to discursive reasoning are legally and factually inane.

◆ *"Majority rule"*. "[O]ne of the premises of the Railway Labor Act", the Court of Appeals intones, "is that unions act democratically to reach a collective decision—the majority is entitled to prevail."[33] In *Steele*, this Court made clear that the Railway Labor Act does *not* contemplate unlimited "majority rule": "While the majority of the craft chooses the bargaining representative, when chosen it represents, as the [Railway Labor] Act by its terms makes plain, the craft or class, and not the majority."[34] Thus, although a union may arguably be selected as the exclusive representative by a majority among the employees of union members promoting their own self-interest as such, the union *qua* representative must prescind from its or its members' merely institutional interests—just as a "democratically" elected legislature, arguably put into office by the votes of greedy special-interest groups, must nevertheless abide by the constitutional requirement to give equal protection to all, not just to its political supporters or clients.

◆ *"Union solidarity"*. "Unions have been authorized", says the Court of Appeals,

> to use the tools of cartels, * * * including dealing with "cheaters." Whatever undercuts concert among labor

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[32] *E.g.*, City of Madison, Joint Sch. Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976); Riley v. National Fed'n of the Blind, 487 U.S. 781, 795-96 (1988).

[33] 981 F.2d at 1531.

[34] 323 U.S. at 202.

> reduces the effective wage unions can secure. Managers try to undermine labor's position by divide-and-conquer tactics: by individual negotiations, by favors for their friends. To say that the union acts in "bad faith" or "discriminatorily" when it attempts to shore up the solidarity of labor by eliminating the distinctions managers try to introduce is to curb an important tool by invoking a slogan.[35]

But even the Court of Appeals recognizes that this rhetoric is overblown.[36]

In any event, the "solidarity-of-labor" concept is inherently flawed, because it derives from the long-discredited Marxian "class-warfare" doctrine that economic life is an irreconcilable struggle between two monolithic antagonists, "labor" (represented by unions) and "capital" (represented by management). In fact, the real relationship between employers and employees is ultimately symbiotic, not antipathetic. And, to the extent conflict exists, it is trinitarian, not dualistic—involving organized employees, unorganized employees, and managers, with the truly permanent enmity between employees who desire to act as individuals or in voluntary groups, and employees who want to

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[35] 981 F.2d at 1532-33.

[36] "There are limits on what labor can do in response to management. Unions may not shoot strike–breakers, and we may assume that they may not negotiate for wage scales the mirror image of managers' preferred systems (that is, a collective bargaining agreement may not provide that workers who respected the picket like, or joined the union, receive a premium over others)." *Id.* at 1533. The Court of Appeals does not explain why in this case it was "rational" for ALPA to negotiate for a seniority system "the mirror image of" the system that United and the fleet qualified pilots preferred.

politicize labor relations through some species of rigid collectivism.[37]

Moreover, contrary to the Court of Appeals, managers may not "undercut[ ] concert among labor" and "undermine labor's position by divide-and-conquer tactics" while a union represents the employees.[38] And before the union is the exclusive representative, when managers may freely deal with individual workers, there is no *"cartel"*, and "concert among labor" is a collectivistic daydream—for employees act on their own behalf, and not through the intermediation of a union, precisely because they recognize a *disparity* of interest between themselves as individuals and other workers "concerting" in a "cartel". Thus, the Court of Appeals' gratuitous defamation of the fleet qualified pilots as "cheaters" because they chose to pursue their own self-interest is economically and legally unwarranted.

In this case, the "distinctions" in seniority favorable to the fleet qualified pilots that ALPA sought to eliminate in revenge for their refusal to support its strike were introduced by agreement between United's managers and individual pilots who were then entitled to act on their own, for their own ends. By stripping the fleet qualified pilots of these benefits for the gratification of the Group of 570, ALPA bolstered not "*labor* solidarity", but only "*union* solidarity"—penalizing the fleet qualified pilots precisely because they refused to salivate as docile lapdogs when ALPA rang the bell calling them to strike. Such action—if this Court allows ALPA to get away with it—may terrorize employees into compliance with the union's future

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[37] *See, e.g.*, W.H. Hutt, *The Strike-Threat System: The Economic Consequences of Collective Bargaining* (1973); G.R. Velasco, *Labor Legislation from an Economic Point of View* (1973).

[38] *E.g.*, Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944)(Railway Labor Act); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)(National Labor Relations Act); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944)(National Labor Relations Act).

ukases. But eviscerating the DFR in order to license ALPA to reduce the employees it purports to "represent" to cowering cravens is no way to achieve "solidarity", unless that term imports only ALPA's interests as an institution separate from—and indeed, as this case shows, antagonistic to—the interests of those employees.

◆ *"Economic warfare"*. Finally, again relying on the atavistic "class-struggle" ideology that "the weapons of economic warfare usually are matched", the Court of Appeals asks whether, "[i]f managers may tempt replacements with premium wages and super-seniority, * * * may the union not try to take these favors away?"[39] The Court of Appeals forgets, however, that the replacements in this case were dealing *for themselves as individuals* during the strike. As far as they were concerned, notions of "economic warfare" were beside the point: which was to obtain employment in the face of ALPA's attempt to shut down the airline. When ALPA later on purported to "represent" these pilots, it was required to treat them, not as "*enemies*" (the Court of Appeals' malediction[40]), but as individuals entitled to demand the maximum benefits ALPA could negotiate consistent with the rights of others in the unit. Nothing but the rancor and vindictiveness of its leadership, and the leadership's desire to placate the Group of 570 for internal political reasons, prevented ALPA from leaving the fleet qualified pilots in the favorable position as to seniority in which it found them. Thus, if this case evidences "economic warfare", it involves a fight between ALPA and its members, on the one side, and the fleet qualified pilots, on the other side—a conflict in which, supposedly, the DFR shields individual employees from the back-stabbing of their "representative".

In sum, if slogans such as these may control the outcome of DFR cases by allowing courts to deem as "rational" unions'

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[39] 981 F.2d at 1532.

[40] *Id*. (emphasis in original).

actions taken for discriminatory reasons and in bad faith, then the DFR is truly "a tale told by an idiot, full of sound and fury, signifying nothing"—and the constitutionality of the Railway Labor Act's scheme of exclusive representation is open to serious question.

IV. The Court of Appeals may not use a mere "rational-basis" test where ALPA's discrimination and bad faith were proven.

The Court of Appeals holds that ALPA may prefer the Group of 570 to the Group of 539 "provided only that a rational person might believe that the[ ] distinction[ ] serve[s] the interest[s] of the [bargaining-unit] as a whole. * * * Slapping the label 'bad faith' or 'discrimination' on a classification that is rationally related to a legitimate objective does not alter the analysis".[41] This holding is doubly flawed.

A. *If* a "rational-basis" test is appropriate where the violation of the DFR implicates only "arbitrary" union conduct, such a test is clearly out of place where the violation rests on invidious discrimination or bad faith—as here, where the violation arises out of ALPA's discrimination against the fleet qualified pilots because of their nonassociation with its strike, and the union's bad-faith refusal to abide by its previous agreement with United so as to wreak vengeance on those employees who refused to dance to its tune.

As this Court early explained,

> the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give

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[41] *Id.* (citation omitted).

> equal protection to the interests of those for whom it legislates.[42]

Where a legislature discriminatorily infringes on *fundamental* rights—such as the First-Amendment right of nonassociation, though, the Constitution imposes two prerequisites to the validity of its action: (i) that the discrimination serve a *compelling* governmental interest; and (ii) that the particular means the legislature employs to serve that interest be *least-restrictive* of the rights of the individuals adversely affected.[43]

Here, ALPA's "renegotiation" of the seniority-rights of the fleet qualified pilots was, as to them, a penalty for their refusal to associate with ALPA during the strike; and, as to the Group of 570, a reward for such association. Thus, ALPA predicated its discrimination on the exercise *vel non* of the First-Amendment right of nonassociation. For that reason, it must justify its action *(if justification be possible)* by a higher level of proof than a mere "rational basis"[44]—which, of course, it has not done.[45]

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[42] Steele, 323 U.S. at 202.

[43] *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 257-58 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330, 339-41 (1972); Shapiro v. Thompson, 394 U.S. 618, 628-31 (1969).

[44] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388-89 (1987); Thomas v. Review Bd., 450 U.S. 707, 719 (1981); Elrod v. Burns, 427 U.S. 347, 368 (1976)(plurality opinion); DeGregory v. Attorney General, 383 U.S. 825, 829-30 (1966); NAACP v. Button, 371 U.S. 415, 444 (1963).

[45] "If justification be possible" warrants emphasis, because, if ALPA's discrimination against the fleet qualified pilots is seen as purposefully intended to penalize the past and deter the future exercise of their fundamental freedom of nonassociation, then ALPA's conduct must be a *per se* violation of the DFR. *See, e.g.*, Shapiro, 394 U.S. at 631, *citing* United States v. Jackson, 390 U.S. 570, 581 (1968).

B. The Court of Appeals' reliance on a "rational-basis" test also fails, because (even if not pretextual) ALPA's alleged purposes in renegotiating the pilots' seniority are not legitimate.

◆ *First*, the Court of Appeals says, ALPA acted "to reduce the advantages enjoyed by the replacements, and thus to strengthen the hand of organized labor in future conflicts with management", thus "shor[ing] up the monopolistic quality of organized labor".[46] This proves too much, as *any* discrimination against nonunion employees or dissident union members in a bargaining-unit would, as an *in terrorem* tactic, predictably "strengthen the hand of organized labor". Moreover, no principled distinction exists between terror-tactics designed to cow employees into slavishly following the union's *diktats*, and "organizing" activities aimed at wooing nonmembers to support the union willingly. Yet, this Court has held that Railway Labor Act unions may not require nonmembers to pay "agency fees" to defray the unions' cost of organizing,[47] and that a union violates the DFR by charging an excessive agency fee.[48] Thus, that discriminatory conduct may "shore[ ] up the monopolistic quality of organized labor" is no defense to a charge of violating, but rather an affront to, the DFR.

◆ *Second*, the Court of Appeals adds, ALPA acted "to restore the seniority system that United had long used."[49] This assumes without proof that the old seniority system had some utility independent of its use as a means selectively to punish the fleet qualified pilots. Yet ALPA's 1987 agreement with United, in which the union pledged never again to challenge the Group of 570's seniority-status, waived any claim ALPA might have

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[46] 981 F.2d at 1535.

[47] Ellis v. BRAC, 466 U.S. 435, 451-53 (1984).

[48] CWA v. Beck, 487 U.S. 735 (1988)(National Labor Relations Act).

[49] 981 F.2d at 1535.

advanced that the earlier system was somehow sacrosanct, as well as evidencing its bad faith.[50]

V. The Court of Appeals' reliance on a "rational-basis" test is improper in a "mixed-motives" case such as this.

Finally, the Court of Appeals errs in employing a mere "rational-basis test" where the DFR violation involved at best "mixed motives" on ALPA's part.

The Court of Appeals too easily concludes that "ALPA had mixed motives. It wanted to harm the replacements, but it also wanted to restore the normal seniority arrangements at United".[51] For, although ALPA's motive "to harm the replacements" the evidence overwhelmingly confirms, its alleged motive "to restore the normal seniority arrangements", *as something independent of retaliation against the replacements*, the evidence does ***not*** substantiate. Indeed, quite the contrary: "the evidence clearly demonstrates that ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly".[52] So, if this is truly a "mixed-motives" case *where ALPA has an arguably innocent motive*, ALPA has yet to prove it.

The Court of Appeals then argues that

> a "bad" motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union. The 219 fleet quali-

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[50] As the District Court found. 765 F. Supp. 474, 493 n.14 (N.D. Ill. 1991).

[51] 981 F.2d at 1534.

[52] 765 F. Supp. at 491 (footnote omitted).

> fied pilots fared no worse than the 320 trainees, and both the 570 and the 539 received seniority slots that would have been forthcoming under United's pre-strike practices."[53]

That ALPA's sacrifice of the seniority-rights of the fleet qualified pilots "serve[d] the interests of workers as a whole" is plausible only by taking *ALPA's institutional interests* as a proxy for the interests of the "workers as a whole", which the DFR does not allow. Moreover, that ALPA sacrificed some of its own adherents in its rabid campaign to crush the "reviled" fleet qualified pilots proves nothing about the even-handedness of its actions. As "supporters of the union", the sacrificial lambs could have viewed their immolation as an institutional benefit for their union—"shor[ing] up the monopolistic quality of organized labor" (in the Court of Appeals' words)—and therefore as an overall benefit for themselves. The fleet qualified pilots, conversely, suffered a loss unmitigated by the psychic gain of marching as willing cannon-fodder on the battlefield of "class warfare". So, the 320 trainees and the 219 pilots are not at all "similarly situated".

Rather than employing a "rational-basis" test, the Court of Appeals should have recognized two things:

- *First*, because ALPA was at least in part *illegally* motivated, the burden of proof shifted to it to show that it would have renegotiated the seniority-rules for a reason unrelated to retaliation against the fleet qualified pilots.[54]

- *And second*, having failed to make such a showing, ALPA had no defense on that score.

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[53] 981 F.2d at 1535.

[54] *See* NLRB v. Transportation Management Corp., 462 U.S. 393, 398-404 (1983).

CONCLUSION

This case continues the tradition of crabbed misconstruction of the DFR on the part of ALPA and the Court of Appeals for the Seventh Circuit that this Court has criticized before[55]—with the added danger that, if not nipped in the bud, the Court of Appeals' adoption of a "mere-rationality" test in cases of discrimination and bad faith may spread, predictably demolishing the DFR as a meaningful protection for nonunion and dissident union-member employees. At that point, fifty years of jurisprudence, since *Steele* in 1944, will be set at nought; and this Court will be faced with an host of petitions attacking the constitutionality of a scheme of exclusive representation that licenses unions to trample roughshod over the rights of those whom they purport to "represent".

Better to scotch the snake now. The petition should be granted.

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May 1993

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[55] O'Neill, __ U.S. at ___, 111 S. Ct. at 1134.

Supreme Court, U.S.
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No. 92-1798

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER,
ALLEN E. BARSETH, ET AL.,
Petitioners,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
and UNITED AIRLINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 92-1798

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and UNITED AIRLINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Defendant-Respondent United Airlines, Inc.[1] ("United") opposes the petition for writ of certiorari filed by plaintiffs-petitioners Lee Rakestraw, et al. ("petitioners"). As explained below, the judgment in favor of United was upheld on grounds independent of whether defendant-respondent Air Line Pilots Association, International ("ALPA") breached its duty of fair representation to petitioners, and there is no basis for petitioners' request that the Court remand to the United States Court of Appeals for the Seventh Circuit to determine United's liability following a determination by this Court of ALPA's liability. Furthermore, the Seventh Circuit's conclusion that an employer

[1]United Airlines, Inc. is a wholly owned subsidiary of UAL Corporation. It has no other parents or subsidiaries within the meaning of Supreme Court Rule 29.1.

cannot be held liable for conspiring to violate a union's duty of fair representation does not conflict with the decisions of other courts of appeal and correctly reflects this Court's precedents.

STATEMENT OF THE CASE

United is a commercial air carrier. (App. 38.)[2] ALPA is the certified collective bargaining representative pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 et seq. ("the RLA") of United's pilots. (App. 39.) Prior to 1984, United's practice had been to offer employment to student pilots, and place them on the payroll, while in United's pilot training program. (App. 40.) Under this practice — and pursuant to the seniority provisions of the United-ALPA collective bargaining agreement, which state that seniority accrues from "date of hire as a student pilot" — pilot trainees were provided a seniority date and tentative seniority number on their first day of training, to become final upon successful completion of training and commencement of active service as pilots. (App. 40.)

In January 1984, United and ALPA commenced lengthy negotiations for a new collective bargaining agreement. (App. 39.) During these negotiations, United foresaw the need for additional pilots based upon expansion of its services. (App. 6, 39.) To meet this need, beginning in December 1984, United selected approximately 570 individuals — commonly known as the "570" — to enter its pilot training program. (App. 6, 39.) However, United was then seeking in its negotiations with ALPA to establish a "new hire pay scale" with wages significantly below those for existing pilots, and hiring student pilots under its existing practice before completion of negotiations with ALPA would have precluded application of the new hire pay scale to the new pilots. (App. 40.) For this reason, instead of hiring the 570 as student pilots, United required each of the trainees to sign a "Flight Officer Training Agreement" acknowledging that they were not being hired as United employees. (App. 40.) With respect to seniority, however, United treated the 570 the same as

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[2]Throughout this Brief, United will use "App." to refer to the Petitioners' Appendix.

prior trainees, providing them with seniority dates, and a tentative seniority number, upon commencement of training. (App. 40.)

On April 16, 1985, the National Mediation Board ("the NMB") released United and ALPA from mediation pursuant to Section 5, First of the RLA, 45 U.S.C. § 155, freeing ALPA to strike and United to implement its bargaining proposals on May 17, 1985. (App. 40-41.) Following the release, United offered employment to each member of the 570 effective on May 17, 1985, and later informed them that they were expected to report whether or not a strike took place, and would never be employed as United pilots unless they reported for work on May 17, 1985. (App. 41.) ALPA, on the other hand, urged the 570 to respect ALPA's picket lines, and promised to do everything it could to protect their employment rights if they honored the strike. (App. 41.) When the strike occurred, all but 31 of the 570 refused to cross the ALPA picket line, and United refused to hire them until later ordered to do so by a federal district court. (App. 47.)

Following release by the NMB, United also began to recruit pilots to work as permanent replacements in the event of a strike by ALPA. (App. 41.) Between May 17, 1985, and the end of the strike on June 15, 1985, United hired 539 strike replacements — the so-called "539" — including petitioners. (App. 49.) Approximately 219 of the 539, and all of the petitioners, were already qualified to fly the type of aircraft United operated, and thus were called "fleet qualified" pilots. (App. 39, 49.) To attract fleet qualified pilots from positions with other carriers, United entered into individual employment agreements pursuant to which they were guaranteed permanent employment with United following the strike with annual salaries of at least $50,000 or $75,000, depending on position. (App. 41-42.) The remainder of the 539 were treated as ordinary new hires. (App. 49.) Like all other United pilots, all of the 539 were provided with seniority dates based on the date they entered pilot training pursuant to the terms of the United-ALPA collective bargaining agreement. (App. 6-7.)

The strike ended on June 15, 1985. (App. 7, 50.) In a Back to Work Agreement, United and ALPA agreed to submit several issues to litigation, including whether United's refusal to hire the

570 because of their support of ALPA's strike violated the RLA. (App. 7.) Following an expedited trial, on August 1, 1985, the district court in that litigation ruled in favor of ALPA on the issue, and ordered United to hire the 570 into the first available openings with seniority rights based upon their initial training dates. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 614 F. Supp. 1020, 1043, 1051, *modified*, 616 F. Supp. 849 (N.D. Ill. 1985). As a result, United began recalling the 570 to active employment on November 9, 1985. (App. 51-51.)

On September 30, 1986, after the 570 had begun employment pursuant to the district court's earlier order, the United States Court of Appeals for the Seventh Circuit reversed on the ground that the 570, as trainees, never became "employees" within the meaning of the RLA, and thus had no right to strike under that statute. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886, 911-17 (7th Cir. 1986). On March 30, 1987, this Court denied ALPA's petition for certiorari. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 480 U.S. 946 (1987).

Following the denial of certiorari, United informed ALPA that it would retain the 570 as United employees only if their seniority dates were adjusted so as to place them behind all of the strike replacements on the pilot seniority list. (App. 8, 53-54.) While ALPA vigorously objected to the adjustment, it had no right to strike over the issue. (App. 8, 53-54.) As a result, on April 3, 1987, ALPA signed the so-called "570 Agreement" which provided, *inter alia*, that the seniority of the 570 would be adjusted to November 9, 1985, to place the 570 below the 539 on the seniority list, and that ALPA would not challenge or demand to modify such seniority dates. (App. 8, 54.)

The 1985 collective bargaining agreement between United and ALPA, reached during the strike, became "amendable" on April 1, 1988, when the parties began negotiations which continued off and on through April 1991. (App. 59.) During these negotiations, ALPA sought an agreement to restore the relative seniority positions which the 570 were given by United prior to the strike, and which were ordered by the district court and continued in effect until April 1987. (App. 9, 59.) United eventually agreed to such a provision as part of a new collective bargaining agreement

which the parties reached in April 1991. (App. 9, 61.) United agreed to this provision, despite ALPA's promise in 1987 not to demand renegotiation of the seniority dates given the 570, because United had come to believe that the modification would be necessary to eliminate vestiges of the 1985 strike and restore productive labor relations on the property, and because ALPA's proposal placed all United pilots on the pilot seniority list in the order in which they first entered training and thus restored the seniority list to its historic basis. (App. 9, 63.) Although ALPA's proposal did not modify the seniority dates of petitioners and the other strike replacements, the effect of the proposal was to place such pilots, all of whom entered training after May 17, 1985, behind the 570 in terms of *relative* seniority. (App. 9, 63.)

Petitioners filed the present action shortly after United and ALPA announced tentative agreement on the new collective bargaining agreement. (App. 9.) In the complaint, petitioners alleged, *inter alia*, that ALPA breached its duty of fair representation to them by renegotiating their relative seniority position, and that United was jointly liable for "colluding" in ALPA's breach of duty by agreeing to its bargaining proposals. (App. 9, 71-84.) Following trial, the district court on May 31, 1991, issued a written opinion finding that ALPA had breached its duty of fair representation to petitioners because of its bargaining position. The district court held, however, that United had not "colluded" in ALPA's breach, finding that United had no hostility or animus toward the 539, and that merely agreeing to ALPA's bargaining proposals did not constitute collusion with the union. (App. 71-76.)

On appeal, United argued that the district court's finding that United did not collude in ALPA's breach of duty was not clearly erroneous, and that in any event an employer could not be held liable under any circumstances for a union's breach of duty of fair representation because such liability would in effect extend the duty of fair representation to the employer. *See American Postal Workers Union, Local 6885 v. American Postal Workers Union*, 665 F.2d 1096 (D.C. Cir. 1981) (employer cannot be held liable for conspiring in union's breach of duty of fair representation). (App. 23-24, 76.) The Seventh Circuit reversed the district

court's finding as to ALPA's breach of the duty of fair representation and affirmed the judgment in favor of United, stating in total:

> "It is equally futile to charge United with 'conspiring' with ALPA to violate its duty of fair representation. There was no violation. Employers are free to prefer one group of employees over another; the fleet qualified pilots, as recipients of a hefty preference, are in no position to protest that offsetting benefits have been ceded to another group. And it is preposterous to depict United as hostile to the fleet qualified pilots. It wanted to save money and reduce strife among its pilots, recognizing that doing so weakened management's hand in any future conflict." (App. 23-24.)

Petitioners sought reconsideration, with a suggestion for reconsideration en banc, before the Seventh Circuit. In this motion, petitioners asserted that the court had "summarily disposed of the issue of United's liability" based on its ruling in favor of ALPA. Although United asserted in its responsive papers that the judgment in its favor was based on independent grounds, petitioners did not ask the Seventh Circuit to clarify this point. The Seventh Circuit denied petitioners' motion for reconsideration on April 6, 1993. (App. 27-33.)

REASONS FOR DENYING THE PETITION

In the petition for writ of certiorari, petitioners set forth three questions for review which concern only the appropriate standard for determining *union* liability for breach of the duty of fair representation, and do not seek review of any issue concerning employer liability. Nevertheless, in a footnote petitioners state:

> "United was joined as a defendant, and is a respondent to this petition, because plaintiffs alleged that United participated in ALPA's breach of duty of fair representation, and also urge that United should be joined to 'insure complete and meaningful relief.' *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 329 (1969).
>
> The Seventh Circuit's holding that United is not liable (App. 22-23) follows and appears to be derivative of the

absolution of ALPA from liability, but in *dictum* that court also implied that an employer pursuing its separate economic interest could never be responsible for a union's violation of the duty, at least if it held no malice toward the affected employees. That point was settled to the contrary of the *dictum* by *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569-70 (1976); see also *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 759 (3d Cir. 1977).

In petitioners' view, should certiorari be granted and the judgment below reversed, the issue of United's liability should be remanded for further consideration." Petition for Writ of Certiorari at 8 n.4.

As shown below, petitioners' request is inappropriate as a matter of procedure, because the judgment in favor of United was based on grounds independent of ALPA's liability of which petitioners have not sought review, and incorrect as a matter of law, because an employer cannot be liable for collusion in a union's breach of duty of fair representation.

I.

THE COURT OF APPEALS UPHELD THE JUDGMENT IN FAVOR OF UNITED ON GROUNDS INDEPENDENT OF WHETHER ALPA BREACHED ITS DUTY OF FAIR REPRESENTATION.

In alleging that United was liable for "collusion" in ALPA's alleged breach of duty, petitioners relied upon *United Independent Flight Officers v. United Airlines, Inc.*, 756 F.2d 1274 (7th Cir. 1985), which in dictum stated that an employer might be liable for "collusion" in a union's breach of duty of fair representation, but held that merely agreeing to the union's collective bargaining proposals as a matter of law did not constitute actionable "collusion." (App. 74.) In the district court, United argued that under this standard it had not colluded in ALPA's alleged breach of duty because United had not acted in bad faith or out of animus toward plaintiffs, and the district judge so found. (App. 76.) On appeal, United argued that this finding was not clearly erroneous, and that in any event an employer as a matter of law could not be

held jointly liable for a union's breach of duty of fair representation (as opposed to independent liability for its own breach of contract or tortious conduct), because such liability would effectively extend the duty to the employer.

Although the Seventh Circuit's discussion of these issues was short, in light of the arguments made to it and the fact that no discussion would have been necessary had the sole basis for the court's decision been its finding in favor of ALPA, the only reasonable interpretation of the Seventh Circuit's opinion is that it adopted United's arguments on these points. Thus, while petitioners seek to characterize the Seventh Circuit decision as "derivative of the absolution of ALPA from liability," it is not.

In light of the independent basis for judgment in favor of United, petitioners' request for a remand to the Seventh Circuit to determine United's alleged liability following a decision by this Court with respect to ALPA's liability is clearly inappropriate. If petitioners had desired to obtain review of the Seventh Circuit's rulings with respect to United, they should have asked this Court directly to consider those issues. Similarly, if they believed there was some ambiguity as to the basis for the Seventh Circuit's ruling in favor of United, they should have asked the Seventh Circuit to clarify its holding. Having not taken either course, petitioners cannot now ask the Court to remand the case against United if they are successful against ALPA.

II.

AN EMPLOYER CANNOT BE HELD LIABLE FOR A UNION'S BREACH OF DUTY OF FAIR REPRESENTATION.

Even if there were some procedural basis for petitioners' request for a remand to determine United's liability following a decision by this Court with respect to ALPA's liability, the premise of petitioners' legal argument is inaccurate. Petitioners argue that the "implication" in the Seventh Circuit's opinion that "an employer pursuing its separate economic interest could never be responsible for a union's violation" of the union's duty fairly to represent all employees conflicts with this Court's opinion in

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 569-70 (1976), and the Third Circuit's opinion in *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 759 (3d Cir. 1977). There is no such conflict.

Petitioners' confusion results from a failure to distinguish between jurisdiction and liability. The issue in *Hines* was whether a union's breach of duty of fair representation in processing a grievance created federal court *jurisdiction* to litigate, or relitigate, a claim against the employer for breach of collective bargaining agreement. The employer's liability was based on its own breach of contract, not on alleged collusion in the union's breach of its duty. Likewise, although the *Goclowski* decision at times reflects the same confusion, it ultimately finds employer liability based on its own conduct in "undermining of the basic collective bargaining agreements," and not on some theory of joint liability for the union's wrongdoing. *See* 571 F.2d at 761 n.18.

As United argued to the Seventh Circuit, the dictum in *United Independent Flight Officers* which states that an employer may be liable for "collusion" in a union's breach of duty of fair representation, reflects the same confusion between jurisdiction and liability. Under the authority upon which *United Independent Flight Officers* relies, *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980), the employer's "collusion" in the union's breach of duty of fair representation was the basis for federal jurisdiction over a cause of action against the employer for breach of contract, and not an independent source of employer liability. *See also Graf v. Elgin, J. & E. Ry. Co.*, 697 F.2d 771, 780-81 (7th Cir. 1983); *Raus v. Brotherhood of Railway Carmen*, 663 F.2d 791, 796-98 (8th Cir. 1981).

Despite the dictum in *United Independent Flight Officers*, United is unaware of any decision holding an employer jointly liable for a union's breach of duty of fair representation. In fact, the only decision of which United is aware that has expressly considered the question, *American Postal Workers Union, Local 6885 v. American Postal Workers Union*, 665 F.2d 1096 (D.C. Cir. 1981), reached the same result as the Seventh Circuit decision here, holding that to hold an employer liable for conspir-

acy in a union's breach of duty would effectively extend that duty to the employer. In fact, the D.C. Circuit noted, an employer is "required only to bargain in good faith with the employees' exclusive representative, and, in so doing, [is] expected to represent its own interests, not those of the employees." 665 F.2d at 1109. Thus, contrary to petitioners' contention, there is no conflict in the circuit courts, or with cases in this Court, which requires this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

In 1991, respondents Air Line Pilots Association, International ("ALPA") and United Air Lines, Inc. ("United") agreed to restore their historic practice of providing all pilots with competitive seniority positions in order of the date pilots began pilot training at United. This collective bargaining agreement reinstates full seniority rights of pilots previously denied those rights by United for participating in a 1985 pilot strike and removes a special seniority preference granted to strike replacements. As a result, all United pilots now maintain competitive seniority rights on the same basis.

The Seventh Circuit held that ALPA did not violate its duty of fair representation under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, in negotiating this 1991 agreement. In reaching this result, the court applied the tripartite duty of fair representation standard recently reaffirmed in *Air Line Pilots Ass'n, Int'l* v. *O'Neill,* 499 U.S. 65, 111 S.Ct. 1127 (1991), confirmed longstanding union authority to protect strikers from employer discrimination through collective bargaining, and rejected petitioners' claim that expected post-strike hostility between strikers and strike replacements disables a union from negotiating to restore "a uniform rule of seniority for all pilots." (App. 2). We show below that the Seventh Circuit's decision raises no issue concerning the administration of the fair representation doctrine by the lower courts, is fully consistent with *O'Neill* and this Court's prior fair representation decisions, and thus presents no question that warrants review.

COUNTERSTATEMENT OF THE CASE

Because the petition has substantially mischaracterized this litigation, we begin with a fuller description of the factual background and the opinions below.

Statement of Facts

The case involves a group of United pilots known as the "Group of 570" who were selected, trained and offered employment by United in late 1984 and 1985 while ALPA and United were engaged in collective bargaining. Prior to these negotiations, all new United pilots were placed on the payroll and ranked on the pilot seniority list in order of the date they began training rather than the later date they became statutory "employees" under the RLA by flying United aircraft in passenger operations. (App. 6, 40-41). In a disputed departure from this practice, United refused to place the Group of 570 on the payroll during training. "[I]n terms of seniority," however, "the 570 were treated like

past student pilots; they received conditional seniority numbers based on their initial day of training." (App. 40).[1]

United initially assured the Group of 570 that they would not be required to cross ALPA picket lines and unconditionally offered employment to all 570 pilots. (App. 41). As a May 17, 1985 strike deadline approached, however, United threatened to discharge any Group of 570 pilot who refused to work during the strike. (App. 6, 41). ALPA urged the Group of 570 to join the strike and pledged to continue its efforts to require United to recognize the 570 as pilots with seniority based on their initial training dates. (App. 6-7). When the strike began, 31 pilots in the Group of 570 went to work for United. (App. 6). Those pilots retained seniority numbers based on their initial day of training in 1984 or 1985 and received seniority dates of May 17, 1985. (App. 57). United discharged every Group of 570 pilot who joined the strike. (App. 6).

United also hired 539 replacement workers (the "Group of 539") during the strike, including both "fleet qualified" pilots such as the petitioners and student trainees who were never required to work during the strike. (App. 6-7, 41-42, 49). United promised petitioners post-strike employment and a substantial premium pay bonus over all other pilots. (App. 6-7, 41-42). However, United did *not* promise petitioners any special seniority rights and specifically informed them that they would be subject to the collectively-bargained seniority system following the strike. (App. 6-7, 23, 42-47, 79-80). The petitioners and all other strike replacements

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[1] A United pilot's seniority *number* ranks his or her relative seniority position on the pilot system seniority list for seniority-based competitive bidding for pilot positions, monthly flight schedules, vacations and other employment benefits. (App. 43). A United pilot's seniority *date* measures a pilot's length of service for other purposes such as company-wide competition for flight passes.

received seniority numbers based on their initial training dates rather than the later dates they began to operate United aircraft.

The strike ended on June 15, 1985. (App. 50). In the negotiations to end the strike, ALPA sought an agreement requiring United to recall the Group of 570 with seniority rights based on their first day of training (and thus ahead of petitioners and other pilots who entered training during and after the strike). (App. 7). When United refused, ALPA obtained a district court order under the RLA under which United recalled the Group of 570 with seniority rights based on their initial training dates. (App. 7). On appeal, however, the Seventh Circuit vacated the 1985 recall order, holding that the Group of 570 were not statutory "employees" protected by the RLA when they joined the strike. (App. 8).

Following the Seventh Circuit's decision, United threatened to fire the Group of 570 unless ALPA agreed to reduce their seniority below the Group of 539. (App. 8-9, 54). As the courts below found, United insisted on this 1987 seniority revision in order to "punish the 570 for striking" (App. 57), to undermine ALPA's ability to engage in future self-help, and to grant all strike replacements a special seniority preference over the 570 as a reward for siding with management in the 1985 strike. (App. 8-9). Once United imposed the 1987 seniority revision, the Group of 570 became the *only* United pilots whose positions on the United pilot seniority list were not based on their first day of training. (App. 8-9).[2]

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[2] Under the 1987 seniority revision, all *nonstriking* pilots in the Group of 570 maintained seniority ahead of the Group of 539 with seniority numbers based on their initial day of training while all *striking* 570 pilots had their seniority positions artifically reduced below the 539. (App. 57). As part of this effort to punish the Group of 570, United also insisted that ALPA waive its right to demand that United restore the full seniority of the 570 in future negotia-

From 1987 through 1991, ALPA publicly and repeatedly informed the United pilot group that the union would seek United's consent to eliminate the discriminatory 1987 seniority revision, to restore what ALPA regarded as the full seniority of the 570, and to remove the seniority preference first received by the Group of 539 in 1987. (App. 59, 74-75). United finally agreed to rescind the 1987 seniority revision in the parties' 1991 collective bargaining agreement. (App. 9, 63). The 1991 agreement thus reinstates the traditional seniority system that existed at United prior to 1987 so that every pilot—whether striker or nonstriker—maintains a seniority number and a position on the pilot seniority list based on his or her initial training date. (App. 9, 62-63).

Course of Proceedings

In the ensuing litigation against ALPA and United, the district court sustained petitioners' fair representation claim, held that petitioners did not maintain any individual agreements with United concerning seniority rights, and dismissed all remaining claims against ALPA and United. (App. 74-84).

The district court found that ALPA and United maintained "a rational basis" for the 1991 agreement (App. 75), that ALPA had pursued a "legitimate goal in attempting to remedy United's past punishment" of the 570 (App. 74), and that the 1991 agreement in fact restores the parties' longstanding seniority system by providing all pilots with seniority positions based on their initial training dates. (App. 63). The district court nonetheless reasoned that the 1991 agreement constituted illegal "discrimination" under the duty of fair representation, as

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tions or to strike over any such bargaining demand. (App. 8, 22-23). As the district court found, however, "ALPA has always considered itself coerced into signing the 1987 letter agreement, and considered the agreement unfair punishment against those members of the 570 who honored ALPA picket lines." (App. 56-57).

a matter of law, because (1) ALPA "lobbied *on behalf of* the Group of 570 . . . and *against* the fleet qualified pilots" in negotiating to eliminate the 1987 revision (App. 70-71) and (2) because strikers and union officials had expressed general bitterness over the years toward replacement pilots who helped management undermine the 1985 strike. (App. 74-76).

Contrary to the petition (Pet. 18), however, the district court did not (and could not) make any finding that post-strike tensions between strikers and nonstrikers actually or substantially motivated ALPA's six-year campaign to restore the seniority of the 570. (App. 20) (explaining that the district court applied *no* legal standard and made *no* factual finding on this issue). Instead, the district court reached the unprecedented conclusion that *any* attempt to renegotiate the 1987 seniority revision constituted "bad faith," as a matter of law, because "once union and management settle a dispute about seniority, the union's duty of fair representation prevents reopening the issue—for the only outcome is to prefer one group of employees over another in a zero-sum game." (App. 10).

A unanimous panel of the Seventh Circuit reversed in an opinion by Judge Easterbrook that plainly articulates and applies the entire tripartite duty of fair representation standard developed by this Court in the line of cases culminating in *O'Neill*. (App. 10-11). Because that standard—like other legal rules—is not "self defining" (App. 11), the court undertook a detailed analysis of the principles involved in the Court's fair representation decisions (App. 11-16) and separately evaluated and rejected each of petitioners' specific claims that the 1991 agreement was "arbitrary," "discriminatory" or negotiated in "bad faith." (App. 10-14, 19-23).

The Seventh Circuit also held that ALPA's attempt to restore the seniority of the 570 and to rescind the

seniority preference conferred on petitioners in 1987 is not "evidence of forbidden motive" under federal labor law (App. 15), that an alleged " 'bad' motive does not spoil" a uniform seniority system based on initial training dates that does *not* discriminate between strikers and nonstrikers (App. 20), and, in any event, that the district court in this case did not (and could not) find that ALPA's alleged institutional hostility to strike replacements was a "but for" or motivating cause of ALPA's six-year effort to restore the full seniority of the 570 and to reinstate "the normal seniority arrangements at United." (App. 20). The court thus concluded that an "agreement that rationally serves the interests of workers as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union" is not "arbitrary," "discriminatory" or evidence of "bad faith" under the *O'Neill* standard. (App. 20).[3]

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[3] Two judges dissented from the Seventh Circuit's subsequent denial of a petition for rehearing en banc. (App. 27-33). The dissenters principally criticized Judge Easterbrook's writing style and faulted Judge Easterbrook for failing to separately address each individual element of the *O'Neill* standard. (App. 29-31). While the dissenters argued that isolated phrases in the opinion below threatened to blur the distinction between "arbitrary" and "discriminatory" or "bad faith" conduct under *O'Neill*, they neither defended the district court's decision nor disputed the panel's conclusion that ALPA's effort to restore the full seniority of the 570 in this dispute was well within its duty of fair representation.

ARGUMENT

The petition offers two principal reasons for granting plenary review of this intensely fact-bound decision: (1) that the opinion below creates a "conflict" among the Circuits by failing to follow the tripartite fair representation standard reaffirmed in *O'Neill* (Pet. 9-11) and (2) that the Seventh Circuit's application of the *O'Neill* standard to the specifics of this case is otherwise inconsistent with this Court's fair representation cases. (Pet. 12-18). Petitioners are plainly wrong on both counts.

I. THE DECISION BELOW APPLIES THE PROPER LEGAL STANDARD AND CREATES NO CONFLICT AMONG THE CIRCUITS

1. First, the court of appeals unmistakably applied the proper fair representation standard under *O'Neill.*

As this Court has repeatedly explained, the system of collective bargaining created by the federal labor statutes requires unions to pursue collective interests in labor contracts that often benefit one group of employees at the expense of another. *See Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-38 (1953). As "a purposefully limited check" on a union's legislative function as collective bargaining agent, *see United Steelworkers of Am.* v. *Rawson,* 495 U.S. 362, 374 (1990), the Court has crafted the duty of fair representation to proscribe arbitrary, discriminatory or bad faith union decisionmaking that lacks any legitimate basis under federal labor law. *See Vaca* v. *Sipes,* 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore,* 375 U.S. 335, 349 (1964). In *O'Neill,* a case involving claims of arbitrary *and* discriminatory union conduct, the Court clarified that this tripartite standard "applies to all union activities, including contract negotiation." *O'Neill,* 111 S.Ct. at 1130. The Court explicitly cautioned, however, that this standard must be developed and applied on a case-by-case basis to serve

the underlying policies and principles of federal collective bargaining law. *See id.* at 1135-36.[4]

The opinion below followed both the standards and principles of *O'Neill* and this Court's prior fair representation cases. The Seventh Circuit thus held that "a union breaches its duty of fair representation if its actions are 'arbitrary, discriminatory, or in bad faith,' " (App. 11) (quoting *Vaca,* 386 U.S. at 190), and carefully canvassed the principal decisions of this Court to apply the entire tripartite *O'Neill* standard and to reject each of petitioners' specific challenges to the 1991 agreement (App. 11-15).

In particular, the court concluded that the 1991 seniority adjustment was not "arbitrary" or "irrational" under *O'Neill* because it reinstates the uniform seniority system based on initial training dates "that had been in place for many years" prior to 1987 (App. 20); that the agreement did not constitute the type of invidious discrimination prohibited by the duty of fair representation because unions can legitimately negotiate to "reduce" special "advantages enjoyed by [strike] replactments" as long as the resulting contract treats strikers and nonstrikers equally (App. 21); and that ALPA did not engage in "bad faith" conduct—*i.e.*, deceit or dishonesty—by negotiating to rescind the 1987 seniority revision because petitioners were well aware of ALPA's public efforts to rescind that agreement, and, in any event, maintained no enforceable or vested rights under the 1987 seniority revision. (App. 21-23).

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[4] While the Court did not rule on the "bad faith" claim in *O'Neill* (Pet. 9), the Court has previously held that bad faith requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey,* 375 U.S. at 348; *see also Amalgamated Ass'n of Street, Elec. and Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299-301 (1971). The lower courts have also uniformly held that "bad faith" refers to deceitful or dishonest union conduct that defrauds bargaining unit members. *See, e.g., Ooley* v. *Schwitzer Div.,* 961 F.2d 1293, 1303 (7th Cir.), *cert. denied,* 113 S.Ct. 208 (1992); *O'Neill* v. *Air Line Pilots Ass'n, Int'l,* 939 F.2d 1199, 1202-07 (5th Cir. 1991).

Accordingly, the opinion below does not create any new rule that permits unions to engage in *any* conduct with a rational basis, however invidious or irrelevant to legitimate unions concerns (Pet. 9-10; Amicus Br. 5-6).[5] So, too, Judge Easterbrook's references to the words of the fair representation standard as "conclusions," "buzzwords" or "epithets" (App. 11, 15) do not criticize or "disparage" *O'Neill.* (Pet. 6, 9). Instead, the court of appeals simply (and properly) recognized that the words "arbitrary," "discriminatory" or "bad faith" are not talismanic substitutes for judicial analysis. Dissatisfied bargaining unit members can always assert that their union "discriminated" against them (*i.e.,* treated them differently than others) and, as do petitioners here, "insist that the distinction must have been part of a 'bad faith' plot to 'penalize' them on account of [their] status." (App. 13). The fair representation doctrine, in turn, requires the lower courts to examine all such claims of "arbitrary," "discriminatory" or "bad faith" conduct against the broader universe of legal rules governing labor unions in order to distinguish illicit penalty from permissible union choice. (App. 15-16).

This decision is entirely consistent with *O'Neill* and the Court's prior fair representation decisions, none of which establishes a rigid formula for adjudicating fair representation claims divorced from content and context. *See, e.g., O'Neill,* 111 S.Ct. at 1136; *Humphrey,* 375 U.S. at 349 (explaining that the existence of "antagonistic

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[5] The court of appeals explained, for example, that the tripartite *O'Neill* standard prohibits unions from "tak[ing] away the seniority of some employees for no reason other than . . . that they opposed the union's leadership," "sell[ing] an employee down the river for . . . a reason forbidden on substantive grounds, such as race or internal union politics," and "disfavor[ing] those among its members who voted against its officers in the last election." (App. 11-12). So, too, the court below explained that the duty of fair representation prohibits unions from discriminating against replacements by negotiating wage scales that treat replacements worse than similarly situated strikers. (App. 16).

interests among employees does not mean that a union breaches the duty "in taking a good faith position contrary to that of some individuals").

2. Second, whatever their criticism of Judge Easterbrook's writing style, petitioners can make no claim that the decision below creates a "conflict" between the Seventh Circuit and any other Circuit concerning the application of *O'Neill*. (Pet. 10-12). Both petitioners (Pet. 11 n.7) and the dissent from the denial of rehearing en banc (App. 29, 31) correctly note that the Seventh Circuit has issued a number of post-*O'Neill* opinions that present and apply the tripartite fair representation standard in the expository format preferred by petitioners. Some of those decisions have found liability under *O'Neill*; others have not. *See, e.g., Souter* v. *United Auto Workers*, 143 L.R.R.M. (BNA) 2269 (7th Cir. 1993) (determining that union's refusal to pursue a grievance was not arbitrary, discriminatory or undertaken in bad faith); *Ooley*, 961 F.2d at 1302-04 (concluding that a union acted in bad faith but that the plaintiff suffered no injury); *Bennett* v. *Local Union No. 66, Glass Workers Union Int'l*, 958 F.2d 1429, 1436-37 (7th Cir. 1992) (affirming a finding of unlawful discrimination and bad faith). Taken as a whole, however, the Seventh Circuit's fair representation jurisprudence following *O'Neill*, including the present case, is indistinguishable from that of any other Circuit.[6]

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[6] The lower courts have uniformly applied the tripartite *O'Neill* standard to reject claims of "discrimination" and "bad faith" where, as here, a union's decision concerning competing seniority claims promotes the interests of one employee group over another. *See, e.g., Allen* v. *United Transp. Union*, 964 F.2d 818, 821 (8th Cir. 1992); *Marshall* v. *Local Union No. 6, Brewers and Gen. Labor Dep'ts*, 960 F.2d 1360, 1370 (8th Cir. 1992); *Ackley* v. *Local Union 337, IBT*, 948 F.2d 267 (6th Cir. 1991); *O'Neill* v. *Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1201-06 (5th Cir. 1991); *Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1106-07 (2d Cir.), *cert. denied*, 112 S.Ct. 305 (1991).

Petitioners thus do not and cannot point to any conflict among the Circuits over the proper application of *O'Neill* to the strike settlement issues presented in this case.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DUTY OF FAIR REPRESENTATION DOCTRINE

As they did below, petitioners contend that the 1991 agreement (1) constitutes illegitimate "discrimination" or "bad faith" because it benefits the Group of 570 and removes a preference previously granted to strike replacements, (2) is "arbitrary" or "irrational" because it revises existing seniority rights in the absence of an intervening event, and (3) unlawfully "penalizes" petitioners because strikers and union officials have expressed animosity towards pilots who sided with management and attempted to take their jobs during the 1985 strike. (Pet. 12-19). The Seventh Circuit properly rejected each of these claims.

1. First, both petitioners and amicus have distorted the Seventh Circuit's actual discrimination holding by claiming that the opinion below permits unions to engage in "terror tactics" (Amicus Br. 17) or "deliberately . . . punish" (Pet. 12) strike replacements simply to enhance union power. (Pet. 12-13; Amicus Br. 17). In fact, the court below *only* held that the duty of fair representation permits unions to eliminate *management* discrimination so as to restore a uniform post-strike seniority system that treats nonstrikers "no worse than it treats similarly situated supporters of the union." (App. 20).

This holding is rooted in settled principles of federal collective bargaining law. The federal labor statutes permit employers to discriminate in limited respects against strikers and in favor of nonstrikers as a means of inducing strike replacements to work during a strike. *See, e.g., Trans World Airlines, Inc.* v. *Independent Fed'n of Flight*

Attendants, 489 U.S. 426, 437-38 (1989) (holding that the RLA permits employers to grant seniority preferences to nonstrikers as part of the "arsenal of economic weapons available to employers during a period of self-help"). That being so, the Court has long recognized that federal labor law permits unions to rescind such discriminatory treatment of strikers and nonstrikers through collective bargaining. *See Trans World*, 489 U.S. at 439 (explaining that unions typically negotiate to remove seniority preferences granted strike replactments and that "such agreements are typically one mark of a successful strike"); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 513-14 (1983) (Blackmun, J., concurring) (same).

Any contrary interpretation of the duty of fair representation would make it virtually impossible to settle strikes since all unions negotiate to protect strikers in post-strike collective bargaining. *See NLRB* v. *Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 790-91 (1990) (explaining that unions routinely demand that employers discharge strike replactments to create jobs for returning strikers). So, too, petitioners' "discrimination" theory would improperly alter the existing balance of self-help rights by permitting employers to penalize strikers and reward nonstrikers during a strike while permanently prohibiting unions from negotiating to restore a level playing field. (App. 14-15).

Petitioners do not and cannot point to any fair representation principle or decision that supports such results. To the contrary, in *O'Neill* itself, the Court held that ALPA enjoyed wide discretion to determine the extent to which it would negotiate to protect strikers from employer discrimination and to remove the seniority preference enjoyed by nonstrikers. *See O'Neill*, 111 S. Ct. at 1131. As the court below explained, "[t]hat [holding] must entail the conclusion that the effort to aid one group [strikers] at the expense of another [nonstrikers] is not *itself* arbitrary or in bad faith." (App. 15). ALPA's

attempt to "restore a uniform rule of seniority for all pilots" (App. 2) thus did not constitute " 'invidious discrimination' of the kind prohibited by the duty of fair representation." *O'Neill*, 111 S.Ct. at 1137.[7]

2. The Seventh Circuit also properly rejected petitioners' claim that the 1991 agreement was "arbitrary" because it did not follow a corporate merger or because the Group of 570 had not attained statutory "employee" status prior to the strike. (Pet. 13-17). Seniority adjustments are not presumptively "irrational" under the duty of fair representation in the absence of an "intervening event" such as a corporate merger. (Pet. 13, 14). As the court of appeals explained, "seniority does not 'belong' to any employee"; it "is a creation of collective bargaining agreements and equivalent contracts between unions and employers." (App. 21). *See Aeronautical Indus. Dist., Lodge 727* v. *Campbell*, 337 U.S. 521, 526 (1949). As a result, unions are not subject to any distinct, especially strict duty of fair representation standard when they negotiate to revise existing seniority rights in the absence of a corporate merger. *See, e.g., Huffman*, 345 U.S. at 333-34, 337-39 (upholding a union's deci-

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[7] The court of appeals also correctly rejected the district court's purely legal conclusion that ALPA acted in "bad faith" under the duty of fair representation when it "ignored its commitment to never reopen the 570 seniority issue." (App. 76 n.14). To demonstrate "bad faith" under the duty of fair representation, petitioners must establish that ALPA intended to deceive or defraud them (and succeeded in doing so) when it acquiesced in the finality language of the 1987 seniority revision. *See Lockridge*, 403 U.S. at 299-300; *Humphrey*, 375 U.S. at 349-50. From 1987 through 1991, however, ALPA repeatedly informed all pilots that the union had reluctantly adopted the 1987 agreement (including its finality language) to save the jobs of the 570, that it believed that the 1987 agreement unfairly punished the 570 for joining the strike, and that it would continue to pursue the full seniority rights of the 570 in every available forum. (App. 56-57). As the court of appeals explained, it is inconceivable that ALPA engaged in "bad faith"—*i.e.*, fraud or deceit—by repeatedly and openly campaigning for over four years to rescind the 1987 seniority revision. (App. 21-22).

sion to renegotiate pre-existing contractual seniority rights in the absence of any merger or other "intervening" event).[8]

Indeed, the point of *O'Neill* itself is that a collectively bargained revision of seniority rights, like the negotiation of any other labor contract provision, is only "arbitrary" if it falls "so far outside a 'wide range of reasonableness' that is it wholly 'irrational.' " *O'Neill*, 111 S.Ct. at 1135-36 (citation omitted). The 1991 agreement is not "wholly irrational" under this standard since it re-establishes a uniform seniority system for all pilots based on initial training dates and provides the Group of 570 with the competitive seniority rights that they held prior to 1987. (App. 9, 20, 59). Even the district court found that ALPA and United maintained "a rational basis" for this agreement. (App. 75).

Nor is the rationality of the 1991 agreement nullified by the fact that the 570 were not statutory "employees" under the RLA during the 1985 strike because they had not yet operated United aircraft. (Pet. 16). The duty of fair representation does not require ALPA and United to adopt a seniority system based on the statutory requirements for "employee" status. *See Huffman*, 345 U.S. at 342-43 (upholding a seniority adjustment granting certain employees seniority positions on the basis of past military service rather than employee status). Indeed,

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[8] The Seventh Circuit's earlier decision in *Barton Brands Ltd.* v. *NLRB*, 529 F.2d 793 (7th Cir. 1976), does not impose any special duty of fair representation standard when a union negotiates to revise seniority rights outside the merger context. (Pet. 14). To the contrary, *Barton Brands* squarely held that while seniority adjustments "may not be made *solely* for the benefit of a stronger, more politically favored group over a minority group," *Barton Brands*, 529 F.2d at 798-99, a union is "absolved of liability" under the duty of fair representation where, as here, it "can show *some objective justification* for its conduct" *Id.* at 800 (emphasis added). The court of appeals clearly applied *Barton Brands* to this case. (App. 21-22).

the seniority positions of petitioners and all other United pilots have always been based on the date they entered pilot training—not the date they attained "employee" status. (App. 9, 20, 59).

3. Finally, the Seventh Circuit correctly held that post-strike hostility between strikers (including union officials) and strike replacements did not nullify ALPA's legitimate and rational effort to restore the seniority of the 570. (App. 20-22). In attacking this holding, petitioners and amicus proceed as if the district court found that ALPA's extended effort to protect the 570 and to rescind the 1987 seniority revision was no more than an animus-driven campaign to "punish" petitioners (Pet. 12-13) and that ALPA's proffered rationale for negotiating the 1991 agreement was merely a "pretext" for this "bad" motive. (Pet. 18-19; Amicus Br. 18).[9]

As the court of appeals explained, however, the district court made *no* such findings in this case; its opinion does not even mention the words "pretext" or "mixed motive." (App. 20). Instead, the district court concluded as a matter of law that any union-negotiated seniority adjustment that benefits strikers at the expense of nonstrikers is unlawful whenever nonstrikers can point to institutional union hostility toward strike replacements. (App. 70-74 & n.11). The Seventh Circuit properly rejected this "hostility" theory for three related reasons.

First, the court below correctly concluded that ALPA's motives—mixed or otherwise—were legally irrelevant to measuring the union's conduct under the duty of fair

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[9] In the footnote repeatedly cited by the petitioners for this proposition, the district court questions the uniformity of the 1991 agreement because the 570 have received seniority *dates* of May 17, 1985 and not their *earlier* training dates. (App. 70 n.11). However, a pilot's seniority *number*—not his or her seniority *date*—determines competitive seniority rights (App. 43), and the district court explicitly found that "the 570 will receive . . . relative seniority numbers based on their initial day of training" like all other United pilots under the 1991 Agreement. (App. 63; *see* App. 9).

representation because the seniority system created by the 1991 agreement does not discriminate in fact between strikers and nonstrikers. (App. 20). The 1991 agreement "restore[s] the normal seniority arrangements at United . . . that had been in place for many years at United" and treats petitioners "no worse than it treats similarly situated supporters of the union." (App. 20). Petitioners' hyperbolic attack on ALPA's bona fides thus establishes at most a "discriminatory motive without a discriminatory rule" (App. 15)—a finding that does not support a breach of the duty of fair representation. *Cf. Palmer* v. *Thompson,* 403 U.S. 217, 225-26 (1971) (holding that allegedly improper motives are irrelevant under equal protection analysis where, as here, the result of the disputed decision is to treat all groups equally).

Second, ALPA in fact negotiated the 1991 agreement with dual motives—it sought to restore the pre-strike seniority system by rescinding management's punishment of the Group of 570 under the 1987 seniority revision *and* to remove the special seniority preference petitioners and others received in 1987. (App. 20-21). As the court below explained, however, *both of these motives were entirely lawful* since a union can legitimately negotiate to rescind the preferences received by replacement workers and to ensure fair and uniform treatment of strikers and nonstrikers. (App. 21-22). Labelling ALPA's effort to eliminate the 1987 seniority revision a campaign to "punish" petitioners (Pet. 12) does not transform ALPA's lawful effort to rescind the seniority preference into a "bad motive." (App. 16). As a result, ALPA's intentional effort to resecind petitioners' seniority preference does not constitute "evidence of forbidden motive" under the duty of fair representation (App. 15), and the entire "mixed motive" and "pretext" discussion in the petition is inapposite.

Third, the court of appeals properly rejected the district court's view that general hostility between strikers

and nonstrikers permanently prohibited ALPA from negotiating to rescind the 1987 seniority revision. This "general hostility" theory would mean that a union breaches the duty whenever it negotiates a labor contract that does not conform to the expectations of nonstrikers. Every strike creates hostility between strikers and nonstrikers, *see NLRB* v. *Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 809-11 (1990) (Scalia, J., dissenting); *Trans World*, 489 U.S. at 437, and strike replacements can always point to post-strike tensions or statements by individual union members or union officials that criticize or express contempt for strike replacements, *see Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 283-84 (1974). As in this case, nonstrikers thus can always claim that *any* union conduct that they do not like breaches the duty of fair representation because they have been subject to general union hostility. (App. 20-21).

In adjudicating analogous hostility claims, the lower courts have uniformly and properly rejected the view that employees can prove a breach of the duty simply from general or institutional hostility and have instead required fair representation plaintiffs to establish a direct and substantial causal connection between alleged institutional hostility and the disputed union conduct. *See, e.g., Ash* v. *United Parcel Serv., Inc.*, 800 F.2d 409, 411 (4th Cir. 1986); *Freeman* v. *O'Neal Steel, Inc.*, 609 F.2d 1123, 1127 (5th Cir.), *cert. denied*, 499 U.S. 833 (1980). Here, the court of appeals properly determined that institutional "antipathy" between the union and strike replacements was an insufficient basis to invalidate the 1991 agreement since ALPA had in fact pursued independent and wholly legitimate goals in negotiating the 1991 seniority adjustment. (App. 21). The plaintiffs thus failed to establish—and the district court did not find—that any general hostility between strikers and nonstrikers was an actual, substantial or motivating cause of

ALPA's campaign to restore the full seniority of the 570 or that this effort was a mere "pretext" to injure petitioners. (App. 21-22).[10]

This unremarkable causation holding provides no basis for reviewing the decision below. *Cf. Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284-87 (1977); *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714-17 (1983).[11]

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[10] For this reason as well, this case thus does not present any vehicle for considering whether the form of "mixed motive" or "pretext" analysis designed to serve distinct statutory purposes under Title VII or the Equal Protection Clause should be imported wholesale into the duty of fair representation doctrine. *Cf. Trans World*, 489 U.S. at 439 (cautioning against the reflexive application of other statutory schemes to RLA disputes).

[11] The amicus brief in support of the petition asserts that petitioners are immune from ALPA's legitimate and rational collective bargaining goals because they maintained immutable, individual seniority rights that "were introduced by agreement between United's management and individual pilots who were . . . entitled to act on their own, for their own ends" (Amicus Br. 13), and because "the replacements in this case were dealing *for themselves as individuals*" (Amicus Br. 14). In fact, both the court of appeals and the district court specifically held that petitioners did *not* maintain any individual agreements with United concerning their seniority relative to the Group of 570. (App. 23, 79-80). Petitioners have not sought review of that holding and have thus abandoned the individual contract claim that underlies the colorful musings of the amicus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER, ALLEN E. BARSETH, *ET AL.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND UNITED AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This reply will respond to certain contentions of respondent Air Line Pilots Association ("ALPA").

1. ISSUES CORRECTLY STATED

ALPA depicts the Petition as a quarrel with the Seventh Circuit's "writing style" (Br. in Opp. 11). Yet at times ALPA admits that its real position is that "the court below correctly concluded that ALPA's motives—mixed or otherwise—were legally irrelevant to measuring the union's conduct under the duty of fair representation . . . ." (Br. in Opp. 16-17); and that "unions are not subject to any distinct, especially strict duty of fair representation stan-

dard when they negotiate to revise existing seniority rights in the absence of a corporate merger" (*id.* 14).[1] As other circuits, and the dissenting judges below, reject those propositions, the Petition correctly states the issues presented.

Despite ALPA's efforts to revise its rationale and its factual premises, the decision below conflicts with the law announced by this Court and by other circuits as to how to determine whether a union's treatment of minority members of a bargaining unit violates its duty to represent them fairly. The resolution of these issues and conflicts is important, for, as the dissent below notes, the duty's promise of safeguarding of minority rights would be hollow if the tripartite standard for determining whether it has been breached is collapsed into the Seventh Circuit's "single rationality test" (App. 31-32).

2. ALPA ANIMUS—TWO-COURT RULE

The District Court saw this as a case in which ALPA acted for an improper reason, that is, animus toward petitioners. The Seventh Circuit treated it as a mixed motive case, recognizing that ALPA acted out of a desire "to harm the replacements" (App. 22), but postulating that other, rational reasons existed to justify ALPA's actions (*id.*). It pointed to institutional objectives of ALPA and

[1] The case cited for the latter proposition, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 333-34 (1953), sanctioned a change in seniority which protected returning veterans, in accordance with policies adopted by Congress. That holding does not aid ALPA; the change in *Huffman* resulted from an intervening event—a World War creating a phenomenal disruption in service to the employer—and obviously was not based on animus toward any other employees in the bargaining unit.

the supposed equal treatment of all pilots, which the District Court found was not ALPA's true motive (App. 70 and n.11).

ALPA proceeds on a tack which both courts below rejected, claiming that its only "dual motives" were "to restore the pre-strike seniority system" and "to remove the special seniority preference" ALPA claims petitioners had (*e.g.*, Br. in Opp. 17). This effort to read its animus out of the case is but an attack on findings of the district court affirmed on appeal, which this Court generally will not consider. *E.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).[2]

3. ALPA'S IMPLAUSIBLE FACTUAL PRESENTATION

ALPA's attack, moreover, is an implausible one, which not only ignores the affirmative evidence of what its motives included, but tries to bypass without ever attack-

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[2] In this regard, ample evidence supported the view of both courts below that the seniority change was pressed "to harm the replacements," and that ALPA's hostility was not merely some "general" feeling, causally unrelated to the seniority issue (Br. in Opp. 18-19). While the tie could have been inferred from the vehemence and length of ALPA's vendetta, there was far more specific evidence. The hatred was expressed by a ranking ALPA official just before the April 1991 seniority change was made. (App. 67, ¶85.) February, 1991 notes of ALPA's staff for the specific negotiations reflected an urgency to make the change lest a "scab" be able to bid for a captain's position (Pl. Ex. 48); ALPA's chief negotiator had written to a similar effect, if in less colorful language, in December 1990 (Pl. Ex. 45); and ALPA had singled out the seniority issue and threatened not to bargain over other issues unless that issue was first resolved in its favor (App. 60). The "unremarkable causation holding" ALPA claims (Br. in Opp. 19) the courts below made is actually the one it espoused but they properly rejected.

ing as clearly erroneous the finding as to what those motives were not: "ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly" (App. 70).[3] When ALPA acted to derogate petitioners' seniority, the Seventh Circuit already had held that the competing group ("the 570") were not United Air Lines employees at the relevant time, *ALPA v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); each had signed an agreement that "[d]uring this training, I understand I will not be an employee of United Airlines" (United Exh. 538). As earlier trainees had come to United as employees under a different arrangement, (802 F.2d at 892), ALPA's claim that it was trying to restore usual seniority practices and to reverse a "preference" or "management discrimination" in petitioners' favor (Br. in Opp. 17, 20), was flawed in its inception. As there was no prior practice of ignoring the difference in employment status, ALPA's action was not restorative nor was putting employees ahead of non-employees in seniority discriminatory.

But the essential point here relates to ALPA's actual motive. It defies the District Court's finding, and reality, to suggest that ALPA would have engaged in a "six year vendetta" (App. 8-9), and made massive economic concessions to United (App. 22), in service of a supposed principle that seniority dates should be unaffected by whether persons were United employees during training. That

[3] ALPA quarrels (Br. in Opp. 16) with our characterizing as "pretextual" its theory as to the basis of its actions (Pet. 16-17). Although the District Court did not use that word, it did find that the theory did not represent a true statement of ALPA's motives. If so, the theory inexorably is therefore pretextual.

could not have been a crucial issue to ALPA, which conceded (see App. 75) that the seniority logically could have been determined in a number of ways.[4] But ALPA's actions are easily explained by its antipathy toward the replacements who aided United in defeating ALPA's strike.

In sum, the dominant theme of ALPA's opposition cannot obscure the true issues which appear on the face of the Seventh Circuit's opinion, as discussed in the Petition.

4. DEGREE OF SCRUTINY OF UNION ACTIONS TOWARD MINORITIES

ALPA misstates the District Court's holding as being that a union with institutional hostility toward non-strikers can never act in a way that favors strikers over them (Br. in Opp. 16). The holding, instead, is that such actions driven by animus as part of a long vendetta in disregard of the union's own promises on which all concerned legitimately relied, violate the duty of fair representation. Also, in contrast to the *carte blanche* the Seventh Circuit gave unions to harm minorities in the bargaining units they control, it is appropriate to scrutinize closely, as other circuits have done (see cases cited at Pet. 13), actions which benefit groups favored by a union over ones it dislikes. Contrary to the Seventh Circuit's view (App. 20), the law has never considered "representation" marred by a desire to harm certain members of a bargaining unit to be "fair." The very theory of all duty of fair representation law makes such limitations on, and careful scrutiny

[4] Petitioners do not think that favoring non-employees over them was ever one of the logical or permissible ways to handle seniority here. And, if truly concerned on the subject, ALPA could have bargained over the terms on which future trainees would be hired, and/or the manner in which their seniority would be computed.

of, union conduct, the minimum standards that must be observed if unions are allowed to claim such persons in determining their right to be the bargaining representative, see *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S. 775 (1990), and then to act collectively for them. ALPA's repeated restatement of the standard of review applied by the Seventh Circuit fails to obscure the issue of whether that standard is too lenient.

5. DISREGARD OF UNION AGREEMENTS

ALPA asserts (Br. in Opp. 13) that "[a]ny contrary interpretation of the duty of fair representation would make it virtually impossible to settle strikes since all unions negotiate to protect strikers in post-strike collective bargaining." This case arises from ALPA's undercutting and ultimate repudiation of an agreement settling a strike; now it contends that unions will be deterred from making such agreements if they have to honor them. That the Seventh Circuit sanctioned this paradigm of bad faith conduct[5] is added reason why review should be granted.

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[5] ALPA persistently understates the reasons why it was found to have acted in bad faith. The District Court found, *inter alia*, that ALPA acted not only for reasons of hostility, indeed hatred (App. 64-70), but in a completely partisan, one-sided manner as between the two groups in the bargaining unit (App. 70-71), and "the fact that ALPA has completely ignored its commitment to never reopen the 570 seniority issue serves as evidence of ALPA's bad faith" (App. 76 n.14).

Contrary to ALPA's implication (Br. in Opp. 14, n.7) its disdain of its promise never to reopen the seniority issue could not be justified had ALPA been brazen enough to act "openly." In fact, however, ALPA acted furtively, purporting to adhere to the agreement for public consumption (App. 56), while "within days" of the 1987 Agreement trying to undo it in negotiations over possible formation of an ESOP which were not visible to the public, nor particularly to petitioners (App. 58).

The brief in opposition is notable for its omission of any good reasons why a union should be able to upset the seniority of a disliked minority years after the issue had been settled. See Petition 13-15.

6. STANDARDS IN MIXED MOTIVE CASE

Apart from its attack on the view of both courts below that it acted "to harm the replacements," ALPA fails (see Br. in Opp. 18-19) to discuss the third question presented by petitioners, that is whether a union that acted for mixed motives, one of which was improper, is automatically absolved of any violation of the duty of fair representation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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